Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

CANOE MANUFACTURING COMPANY, INC.
AND M. ROBERT ULLMAN,
Petitioners

v.

JOSEPH H. JONES, ESQUIRE AND
WILLIAMSON, FRIEDBERG & JONES,
Respondents

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a "GVR" Order should issue to remedy the palpably clear violation of Petitioners' Due Process and Equal Protection rights committed when their timely State court appeal -- filed on the 29th day of a mandatory 30-day period in full compliance with State procedural rules and controlling precedent -- was nevertheless quashed as "untimely" at the behest of their opponents, in complete disregard of the applicable procedural rules and controlling case law, and in reliance on a heretical alternative "rule" of timeliness espoused by Petitioners' opponents as a means of defeating appellate consideration of Petitioners' claims.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Canoe Manufacturing Company, Inc., is a Pennsylvania Business Corporation of which Petitioner M. Robert Ullman is Chief Executive Officer and sole shareholder. Canoe Manufacturing has no parent corporation and no publicly-held company holds any of Canoe Manufacturing's stock.

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PETITION FOR WRIT OF CERTIORARI

Canoe Manufacturing Company, Inc., and M. Robert Ullman respectfully petition for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

No opinion, reported or unreported, has been issued by a State appellate court in connection with this matter. The unpublished opinion of the Court of Common Pleas of Schuylkill County is reproduced in the Appendix to this Petition at page 18a.

STATEMENT OF BASIS OF JURISDICTION IN THIS COURT

The Order of the Supreme Court of Pennsylvania denying Petitioners' petition for allowance of appeal was filed November 1, 2006. Pursuant to Supreme Court Rule 13.3, the 90-day period runs from that date and expires on January 30, 2007.

The Supreme Court of the United States is vested with jurisdiction of this timely petition for writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

U.S. Const. Amend. XIV Section 1
Pa. Const. Art. V, § 9
Pa. Const. Art. V, § 10(c)
42 Pa. C.S. § 1722(a)(1)
42 Pa. C.S. § 5105(a)(1)

42 Pa. C.S. § 5501(a)
42 Pa. C.S. § 5502(a)-(b)
42 Pa. C.S. § 5571(a)-(b)
42 Pa. C.S. § 5572
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Pa. R.A.P., Rule 903(a)
Pa. R. Civ. P. No. 236
Superior Court Internal Operating Procedures, §§ 65.7, 65.9, 65.12, 65.22, 210 Pa. Admin. Code §§ 65.7, 65.9. 65.12, 65.22

STATEMENT OF THE CASE

A. INTRODUCTION

The "drop dead" date for filing court papers necessary to preserve the right to appeal should not be a "moveable feast" -- that is hardly a controversial proposition. Yet, despite the best efforts of the Pennsylvania Supreme Court to simplify the "calculus" required to determine the limits of the appeal period, and Petitioners' conscientious efforts to comply with that court's dictates, the courts below have demonstrated that any appearance of certainty in Pennsylvania's appellate practice is illusory because an adverse litigant remains empowered to "trump" a timely filing by proffering an *ad hoc* alternative calculus designed to put the appellant out of court. Petitioners herein have been victimized by application of that signally unjust "double standard."

The quashed Pennsylvania Superior Court appeal was beyond reasonable doubt a **timely** appeal, perfected on February 7, 2006 from an Order granting summary judgment on which judgment was entered and the requisite notice under a State procedural rule (Pa. R. Civ. P. 236) noted on the docket on January 9, 2006. That appeal was nevertheless summarily dismissed by the Deputy Prothonotary of the Superior Court on April 12, 2006, in response to a Motion to Quash which falsely asserted that the Order appealed from was "really" an **Order dated December 30, 2005** as to which "**Rule 236 Notice was sent the same day.**" Although the docket entries flatly contradict that assertion, Petitioners have been stripped of their appellate rights and denied their "day in court" after 12 years of litigation as a consequence of a "blunder" that was never committed.

B. FACTUAL BACKGROUND

The underlying action -- sounding in breach of fiduciary duty and legal malpractice -- was brought by Canoe Manufacturing Co., Inc. ("Canoe"), a manufacturer of children's jeans for K-Mart, Sears, Montgomery Ward and other large customers, and once the second-largest employer in Schuylkill County, and M. Robert Ullman, Canoe's President and CEO ("Ullman"), against Canoe's former attorney, Joseph H. Jones, Esquire ("Jones"), and Jones's law firm, Williamson, Friedberg & Jones.

Jones was not only a prominent Pottsville attorney with an active commercial practice, but was also a Director of Meridian Bank and the Chair of Meridian Bank's Directors' Audit Committee.

Jones represented Canoe in its effort to secure new financing from Meridian Commercial Credit Corp. ("Meridian") to help Canoe, then Meridian's largest and most profitable customer, weather severe cash flow problems in 1985 and 1986. In the course of Jones's negotiations to obtain new financing for Canoe, Meridian demanded additional collateral; a "commitment letter," pursuant to which Meridian agreed to furnish new financing in return for additional collateral, was subsequently approved by Meridian's Loan Committee and issued on March 31, 1986. After being signed by the President of Meridian and countersigned by Ullman on Canoe's behalf, the "commitment letter" was entrusted to Jones and consigned to his files.

In the course of drawing up loan documentation to secure additional collateral, language was inserted which had the effect of securing additional collateral for Meridian from Canoe **but removing Meridian's obligation to extend additional financing**. Although Jones

initially opposed the inclusion of such a provision on the ground that it was prejudicial to Canoe and inconsistent with the "commitment letter," that language was included in the final documents. Accordingly, Canoe **did** furnish the additional collateral but **did not** receive additional financing. As a result, Canoe failed.

Canoe initially filed for Chapter 11 bankruptcy protection in 1987; two years later, however, upon petition of Meridian, the proceedings were converted to a Chapter 7 liquidation.

On May 13, 1991, during a deposition of Jones in another case, Canoe and Ullman discovered the existence of the March 31, 1986 "commitment letter" which had languished in Jones's files for five years. As a result of that discovery, this case was commenced on May 5, 1993 by Canoe and Ullman against Jones, Williamson, Friedberg & Jones and Meridian in the Court of Common Pleas of Schuylkill County.

The case proceeded to a period of extensive discovery during which Canoe and Ullman produced five to ten cartons of documents, Jones and his firm produced all discoverable portions of their files relative to Canoe, and Meridian produced more than 20 file cabinets of documents. Over all, more than 40 depositions were taken. In 1999, the Court entered an Order setting a discovery deadline of September 30, 1999.

On November 3, 1999, Jones and his firm moved for summary judgment, asserting numerous grounds. On December 22, 2000, the Honorable J. Michael Stine granted summary judgment only on the basis of the statute of limitations. Because this ruling left open the Counterclaims another party, Meridian, against of Canoe and Ullman, the Order was not then appealable as of right. Once Canoe and

Ullman were able to resolve their differences with Meridian, however, Canoe and Ullman filed a praecipe for entry of judgment and appealed the summary judgment award to the Superior Court on April 30, 2003.

On February 16, 2004, the Superior Court reversed the decision of the Court of Common Pleas granting summary judgment to Jones and his firm and expressly remanded this case to Schuylkill County for trial, suggesting that the matter be reassigned to a different Judge. The Superior Court panel (Klein, Bender and Olszewski, JJ.) determined in a memorandum decision that there were genuine issues of material fact as to timing of Canoe and Ullman's knowledge and appreciation of the significance of the March 31, 1986 "commitment letter" which precluded summary judgment on the applicability of the "discovery rule" to the statute of limitations issue.

Jones and his firm then filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was denied on October 5, 2004. The case was finally remanded to the Court of Common Pleas for Schuylkill County, where it was assigned to the Honorable C. Palmer Dolbin in place of Judge Stine.

On May 16, 2005, Jones and his firm filed a **Second Motion for Summary Judgment raising three entirely new issues**: (1) that Canoe and Ullman had no claim because the March 31, 1986 "commitment letter" was only an unenforceable "agreement to agree"; (2) that the March 31, 1986 "commitment letter" is merged into the subsequent loan restructuring final agreements of April 18, 1986, and thus had no legal significance; and (3) that Canoe and Ullman's right to proceed with this action was extinguished by the final decree issued in Canoe's

bankruptcy proceeding.

A motion to strike the Second Motion for Summary Judgment filed by Canoe and Ullman was immediately denied. After extensive briefing and submission of exhibits, the matter was argued in July of 2005. On December 30, 2005, Judge Dolbin granted the Second Motion for Summary Judgment on two of the three new grounds, namely, the "agreement to agree" theory and bankruptcy defense. The text of the December 30, 2005 Order stated:

> AND NOW, this 30th day of December 2005, Defendants' Second Motion for Summary Judgment is granted. No genuine issue of fact exists, and Defendants are entitled to judgment as a matter of law.
>
> BY THE COURT:
>
> /S/ Dolbin, J.
> CYRUS PALMER DOLBIN,
> Judge

See Appendix ("App.") at 18a. The above Order, on its face, neither enters judgment in favor of Respondents nor directs entry of judgment by the Prothonotary.

The docket for December 30, 2005 reflects that Judge Dolbin had copies of his Opinion and Order date-stamped and mailed to the parties. App. 10a. No Rule 236 Notice was sent nor was a notation made on the docket that Rule 236 Notice was sent. Neither was judgment entered on the docket on December 30, 2005.

Counsel for Jones and his firm filed a praecipe for entry of judgment on Judge Dolbin's Order on January 9, 2006. App. 19a. In response to that praecipe, the Prothonotary, on January 9, 2006,

entered judgment on the December 30, 2005 Order and sent a Notice pursuant to Pa. R. Civ. P. 236 to counsel. App. 10a.

On January 18, 2006, Canoe and Ullman moved for reconsideration asserting that the Court's ruling on "agreement to agree" constituted mistake of law, that it wrongly applied the case law of Pennsylvania and wrongfully invaded the jury's province, and that it incorrectly analyzed this matter on the basis of contract law when the causes of action asserted herein were tort causes of action for professional negligence/legal malpractice and breach of fiduciary duty. Further, Plaintiffs/Canoe asserted mistake of law in that the Court misinterpreted the Bankruptcy Decree and mistook causes of action "abandoned" in the bankruptcy proceeding. Equally, Plaintiffs/Canoe asserted mistake of law in that the Canoe Bankruptcy Decree cannot dispose of Mr. Ullman's causes of action herein since he was not a party to the Canoe bankruptcy proceeding.

On February 6, 2006, Judge Dolbin denied the Motion for Reconsideration. App. 10a. On February 7, 2006, 29 days after Rule 236 Notice was noted on the docket, Canoe and Ullman filed their Notice of Appeal in the Court of Common Pleas for Schuylkill County[1]. App. 10a, 23a.

Once the appeal was docketed in the Superior

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[1] The right of appeal is guaranteed by Pa. Const. Art. V, § 9, and governed by a combination of various section of the Judicial Code, 42 Pa. C.S. §§ 1722(a)(1), 5105(a)(1), 5501(a), 5502(a)-(b), 5571(a)-(b), 5572, and the Supreme Court-promulgated Pennsylvania Rules of Appellate Procedure, including Pa. R.A.P., Rules 105, 108(a)(1), (b) and 903(a). The mandatory 30-day time limit for perfecting an appeal appears in both the statutory provisions and the related rules. Unlike Fed. R. App. P. 4(a)(5) and 4(b)(4), and Supreme Court Rule 30, the Pennsylvania Rules of Appellate Procedure do not permit extensions of the time limit for filing appeals in civil or criminal cases. Pa. R.A.P. 105(b).

Court, Petitioners were required to complete a "Civil Docketing Statement" (App. 24a) the purpose of which is to facilitate determination of timeliness, finality and other prerequisites to appellate court jurisdiction in the Pennsylvania's Unified Judicial System. Petitioners accurately reported on this form that the date of the judgment appealed from was January 9, 2006, and that the appeal was filed on February 7, 2006, one day prior to the expiration 30-day period within which an appeal must be perfected.

The Superior Court maintains a full-time Central Legal Staff ("Staff") of licensed Pennsylvania attorneys for purposes including "screening cases." Superior Court Internal Operating Procedure ("IOP") § 65.7, 210 Pa. Admin. Code § 65.7. Among the responsibilities of the Staff is "the screening of docketing statements filed pursuant to Pa.R.A.P. 3517":

> These statements are to be initially screened to determine if the appeal is jurisdictionally or procedurally defective. No appeal shall be subject to being quashed on the basis of the docketing statement review alone; rather, if a defect is apparent, a letter shall be addressed to counsel to verify same. Following notification to counsel, the appeal is subject to being quashed by the assigned monthly motions judge.

IOP § 65.12, 210 Pa. Admin. Code § 65.12.

It should be mentioned that the Staff "flags" premature as well as untimely appeals, and will frequently direct the prospective appellant to take further action, such as a request for formal entry of final judgment in cases where the Order of which review is sought is "final" in legal effect but not in

form, such as an Order which grants definitive relief but does not enter or direct the entry of judgment on the docket. Such directives from the Staff come with stringent time limits and usually require a trip to the courthouse to obtain a certified and sealed copy of final judgment for presentation to the Superior Court.

No letter issued from the Staff to Petitioners in connection with their February 7,2006 appeal, since Respondents had arranged for entry of final judgment on the Order granting summary judgment on January 9, 2006.

On February 24, 2006, Counsel for Jones and his firm filed an unverified Motion to Quash Appeal which asserted that the Order appealed from was "really" Judge Dolbin's Order of December 30, 2005. App. 39a. Jones's lawyers represented to the Superior Court that Judge Dolbin's December 30, 2005 Order **"entered judgment in favor of moving defendants and against plaintiffs**." App. 41a. Jones's lawyers also represented to the Superior Court that "**Rule 236 Notice was sent the same day**[,]" i.e., December 30, 2005. *Id.* Both of those representations are belied by the docket entries and the record.

In paragraph 2 of the Motion to Quash, Jones's lawyers represented to the Superior Court that the appeal had been taken from an Order of the Court of Common Pleas of Schuylkill County dated December 30, 2005, App. 39a-40a, when in fact the appeal was taken from the judgment entered on the docket in that court on January 9, 2006, as unambiguously reflected in the Notice of Appeal filed February 7, 2006, 29 days after judgment was entered and Rule 236 Notice sent. In paragraph 9, Jones's lawyers represented to the Superior Court that the Court of Common Pleas of Schuylkill County "entered judgment in favor of moving defendants and against

plaintiffs" on December 30, 2005. App. 41a. Neither the Opinion of the Honorable Cyrus Palmer Dolbin dated December 30, 2005 nor the accompanying Order purported to enter or directs entry of judgment in favor of Jones and his firm.

Most glaring among the misrepresentations made in the unverified Motion to Quash, however, is paragraph 10, in which Jones's lawyers assert that "Rule 236 Notice was sent" on December 30, 2005. App. 41a. No Rule 236 Notice was sent on December 30, 2005, nor was a notation made on the docket on that date that Rule 236 Notice was sent. Date-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties, as the docket indicates. That fact is entirely irrelevant to the purely technical issues of timeliness on which the Motion to Quash purported to be based. What is significant is that **no Rule 236 Notice accompanied that mailing and no docket entry even suggests that one did.**

Canoe and Ullman filed an Answer to the Motion to Quash on March 13, 2006, App. 47a, to which Jones and his firm filed a Reply on March 23, 2006. App. 64a. On April 12, 2006 the Superior Court Deputy Prothonotary entered a Per Curiam Order quashing the appeal. App. 77a.

Pursuant to Superior Court IOP § 65.22, Motions to Quash or Dismiss Appeals "shall be subject to review and disposition by a panel of three commissioned judges." 210 Pa. Admin. Code § 65.22. The actual decision-making mechanism again invokes the assistance of the Central Legal Staff:

> B. After a motion subject to this Rule has been filed by the Prothonotary's office, the Prothonotary shall forward the motion to Central Legal Staff which shall prepare and

> circulate to the motions panel a legal memorandum and recommendation. Votes thereon shall be due three weeks from the date on which the motion and accompanying document are sent by Central Legal Staff. Votes on cases which have been identified as family law fast track cases shall be due two weeks from the date on which the motion and accompanying documents are sent by Central Legal Staff.
>
> **C. If, in reviewing motions to be referred to a motions panel, Central Legal Staff determines that the motion is patently defective or the appeal is clearly defective or can be disposed of based upon established case law, the motion may be presented to the assigned motions judge.**

210 Pa. Admin. Code § 65.22(B)-(C)(emphasis supplied).

It cannot be determined from the record whether a three-judge panel or a single judge directed issuance of the Order quashing Petitioners' appeal. Assuming Respondents' proffered recomputation of the time for filing an appeal was somehow accepted as "correct," the decision may well have been made by one judge relying on the reasoning of one Staff attorney.

On April 26, 2006, Canoe and Ullman filed an Application for Reargument Before a Court En Banc of Order Improvidently Quashing Appeal. App. 78a. The Superior Court Deputy Prothonotary, deeming the filing to be an "Application for Reconsideration," denied the Application by Per Curiam Order on May 5, 2006, App. 107a, before Jones's Answer (App. 95a)

was received.

Petitioners' timely Petition for Allowance of Appeal (App. 108a) to the Supreme Court of Pennsylvania was denied on November 1, 2006 without opinion or explanation. App. 148a.

REASONS FOR GRANTING THE WRIT

Because the Question Presented by this petition for writ of certiorari boldly seeks a "GVR" Order to remedy what is characterized as a patent violation of the petitioners' constitutional rights, it must be emphasized at the outset that Petitioners appreciate the unusual tenor of their petition and have attempted to demonstrate both the absolute necessity and appropriateness of the requested relief and the palpable nature of the constitutional violation, as cogently and rapidly as they are able, within the "four corners" of their petition.

There can be no more dispute today than there was over half a century ago that the Supreme Court of the United States "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982)(Rehnquist, J., dissenting), quoting Vinson, C.J., address before American Bar Association September 7, 1949, *quoted in* R. STERN & R. GRESSMAN, SUPREME COURT PRACTICE 258 (5th ed. 1978). Nevertheless, a leading commentator has stated, albeit with significant caveats, that "[t]here appears to be agreement that summary disposition [by the Supreme Court] is appropriate to correct clearly erroneous decisions of lower courts," R. STERN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002)("STERN & GRESSMAN") at 321, and that "[t]he [Supreme] Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous[.]" STERN & GRESSMAN at 323.

"Error correction . . . is outside the mainstream of the Court's functions[,]" and "is not among the 'compelling reasons' (Rule 10) that govern the grant of certiorari." STERN & GRESSMAN at 322. Indeed, the Court is "much too busy to correct every

error that is called to [its] attention in the thousands of certiorari petitions that are filed each year." *Idaho Department of Employment v. Smith*, 434 U.S. 100, 104 (1977)(Stevens, J., dissenting). "This, justification for granting certiorari merely to correct a clearly erroneous decision must be found elsewhere, such as in the provisions of 28 U.S.C. § 2106." STERN & GRESSMAN, *id.* "Under that statute, error correction becomes an exercise of the Court's statutory power to set aside or reverse, 'as may be just under the circumstances,' any judgment of a court lawfully brought before it." STERN & GRESSMAN, *id.*, citing *Johnson v. Chicago Board of Education*, 457 U.S. 52, 54 (1982)(Rehnquist, J., dissenting). That statutory power includes the power to "remand the cause and direct the entry of such appropriate judgment, decree or order, or require . . . further proceedings[.]" 28 U.S.C. § 2106.

To qualify for such treatment, a "clearly erroneous decision" should involve "an error of greater magnitude than the mere technical, harmless or parochial error." STERN & GRESSMAN at 322. "When the error is of constitutional dimension, summary reversal 'should be reserved for palpably clear cases of constitutional error.'" STERN & GRESSMAN, *id.* at n.100, quoting *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974)(Rehnquist, J., dissenting). Petitioners respectfully submit that the gross violation of their rights to due process and equal protection demonstrated in their petition for writ of certiorari is just such palpably clear error of constitutional dimension which, if this Court denies review, will go uncorrected, leaving in place an arbitrary and ill-considered state court decision that worked an extreme injustice.

In *Lawrence v. Chater*, 516 U.S. 163 (1996), this Court expanded the practice of granting

certiorari, vacating and remanding (a "GVR" Order) in appropriate cases as a means to "conserve[ ] the scarce resources of this Court that might otherwise be expended on plenary consideration [and to] assist[ ] the court below by flagging a particular issue that it does not appear to have fully considered . . . ." Id. at 167. This case clearly presents a situation in which there is a compelling need to mandate "fuller" consideration below. Although Petitioners do not contend that intervening factual or legal developments render the lower court's decision infirm, but rather that the court below simply failed to follow clear published rules already definitively interpreted consider by the State's highest court, the rationale of a GVR Order is nevertheless well suited to the present case because a GVR Order will prompt the court below to give an appropriate level consideration on remand to the propriety of a judicial action extremely unlikely to survive such scrutiny. All Petitioners request is an "evenhanded administration of the law" involving "strict adherence to the procedural requirements specified by [the state's rulemaking authority]." *Mohasaco Corp. v. Silver*, 447 U.S. 807, 826 (1980). What they have received from their State's judicial system is the exact opposite.

The aberrant decision of the Superior Court in this case on the fundamental question of the proper manner in which to compute the time period for taking an appeal in a civil case is directly contrary to the decisions of the Pennsylvania Supreme Court, as well as the decisions of prior panels of the Superior Court following the state Supreme Court's binding precedent. In granting Respondents' Motion to Quash, the Superior Court reached a result directly contrary to the decisions of the state Supreme Court in *Frazier v. City of Philadelphia*, *Hepler v. Urban*

and *Yeaple v. Yeaple*, previously followed by the Superior Court in *Gavula v. ARA Services, Inc.*, 756 A.2d 17 (Pa. Super. 2000), *Cardwell v. Chrysler Financial Corp.*, 804 A.2d 18 (Pa. Super. 2002), *Vertical Resources, Inc. v. Bramlett*, 837 A.2d 1193 (Pa. Super. 2003), and *Reeves v. Middletown Athletic Association*, 866 A.2d 1115 (Pa. Super. 2004), and completely disregarded the interplay between Rule 236 and 227.4(2) of the Rules of Civil Procedure and Rules 108(b), 301(a) and 903(a) of the Rules of Appellate Procedure.

Pa. R. Civ. P. 236, entitled "Notice by Prothonotary of Entry of Order or Judgment," provides in pertinent part:

> (a) The prothonotary shall immediately give **written notice** of the entry of
>
> . . . . .
>
> (2) any other order or judgment to each party's attorney of record or, if unrepresented, to each party. **The notice shall include a copy of the order or judgment**.

(Emphasis supplied.) As the emphasized language makes clear, Rules 236 requires a **separate written notice** -- the order or judgment alone does not constitute "Rule 236 Notice." Indeed, prior to it amendment in 1994, Rule 236 "required notice of an order but not the mailing of a copy of the order itself[.]" Pa. R. Civ. P. 236, 1994 Explanatory Comment. The Rule now requires both.

The issue was controlled by the Pennsylvania Supreme Court's decision in *Frazier v. City of Philadelphia*, which clarified once and for all the method for determining timeliness of an appeal, and for that reason must be quoted at length:

> Rule of Appellate Procedure 301(a) provides that "[n]o order of a court shall be

appealable until it has been entered upon the appropriate docket in the lower court." *See generally Sidkoff, Pincus, et al. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 521 Pa. 462, 468, 555 A.2d 1284, 1287 (1989). Further, Rule of Appellate Procedure 108(b) designates the date of entry of an order, for purposes of appeal, as follows:

> (b) Civil orders. The date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given as required by Pa. R. Civ. P. 236(b).

Pa. R.A.P. 108(b). As previously noted, Rule of Civil Procedure 236(b) describes the prothonotary's obligation to "note in the docket the giving of the notice and, when a judgment by confession is entered, the mailing of the required notice and documents."

Thus, pursuant to the express terms of the rules, an order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given. *See Yeaple v. Yeaple*, 485 Pa. 399, 403, 402 A.2d 1022, 1024 (1979); *see also Speight v. Burens*, 371 Pa.Super. 478, 481 n. 3, 538 A.2d 542, 543 n. 3 (1988). *Cf. Hepler v. Urban*, 518 Pa. 482, 484-85, 544 A.2d 922, 923 (1988)(finding that, where there is no indication in the docket that notice has been provided in accordance with Rule 236, an order granting summary judgment was not final). **That the parties may have received notice of the order does not alter the formal date**

> **of its entry and the associated commencement of the period allowed for appeal for purposes of the rules.** The procedural requirements reflected in the rules serve to promote clarity, certainty and ease of determination, so that an appellate court will immediately know whether an appeal was perfected in a timely manner, thus eliminating the need for a case-by-case factual determination. *See generally Commonwealth v. Dorman*, 272 Pa.Super. 149, 153-54, 414 A.2d 713, 716 (1979).

Frazier v. City of Philadelphia, 557 Pa. at 621, 735 A.2d at 115 (emphasis supplied).

In *Frazier*, although the appellant received actual notice by mail of an adverse judgment entered on the docket on April 8, 1997, the Pennsylvania Supreme Court unanimously held that the 30-day appeal period under Pa. R.A.P. 903(a) was not triggered until a notation was entered on the docket pursuant to Pa. R. Civ. P. 236(b) **some six months later** that notice of that judgment had been given to the parties, and that an appeal taken on November 10 , 1997, within 30 days of that belated notation was therefore timely.

Respondents relied heavily below on the Superior Court's opinion in *In re Trust Under Deed of Green*, 779 A.2d 1152 (Pa. Super. 2001)[2], in which, according to Respondents, the Pennsylvania Supreme Court **denied** allocatur ("appeal denied, 805 A.2d 524

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[3] In that case the Superior Court acknowledged that the prothonotary failed to make the appropriate docket entry giving notice to the parties pursuant to Rule 236 but deemed that jurisdictional defect waived. *In re Trust Under Deed of Green*, 779 A.2d 1152, 1157 n.5 (Pa. Super. 2001), *reversed and remanded*, 572 Pa. 408, 816 A.2d 224 (2003).

(Pa. 2002)")[3] citing that decision as controlling authority three times in their Motion to Quash and once in their Reply to Petitioners' Answer. In reality, the Pennsylvania Supreme Court not only **granted** allocatur in *In re Trust Deed of Green* but summarily **reversed**, citing *Frazier v. City of Philadelphia*, controlling authority Respondents chose to ignore. *In re Trust Under Deed of Green*, 572 Pa. 408, 816 A.2d 224 (2003).

It is also ironic that irregularities in compliance with Rule 236 by the Court of Common Pleas of Schuylkill County, the very court from which the appeal in this case was taken, have **twice** been the subject of prior scrutiny by the Pennsylvania Supreme Court, first in *Hepler v. Urban*, 518 Pa. 482, 544 A.2d 922 (1988), a decision cited by the *Frazier* Court, and again in *Hepler v. Urban* ("*Hepler II*"), 530 Pa. 375, 609 A.2d 152 (1992), in which the state Supreme Court expressly held that the requirement under Pa. R.A.P. 108(b) that "the date of the entry of an order . . . shall be the day on which the clerk makes the **notation in the docket** that notice of entry of the judgment has been given as required by Pa. R. Civ. P. 236(b)" is both literal and mandatory. *Hepler v. Urban*, 530 Pa. at 380, 609 A.2d at 154 (emphasis supplied).

Judge Dolbin's December 30, 2005 Order on its face "grants . . . relief but does not itself enter judgment or order the prothonotary to do so." *See* Pa. R. Civ. P. 227.4(2). Indeed, the docket for December 30, 2005 reflects only that Judge Dolbin had copies of his Opinion and Order date-stamped and mailed to

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[4] Respondents erroneously cite to the Pennsylvania Supreme Court's denial of allocatur in *Green v. Green*, 783 A.2d 788 (Pa. Super. 2001), *allocatur denied*, 569 Pa. 707, 805 A.2d 824 (2002)(Nos. 1051-1053 MAL 2001), which is a different case.

the parties. **No Rule 236 Notice was sent nor was a notation made on the docket that Rule 236 Notice was sent. Neither was judgment entered on the docket on December 30, 2005.**

Pa. R. Civ. P. 227.4(2) expressly provides for entry of judgment upon praecipe of a party where an Order "grants . . . relief but does not itself enter judgment or order the prothonotary to do so." Given the wording of Judge Dolbin's Order, coupled with the absence of entry of judgment or a Rule 236 Notice, a praecipe was clearly necessary to effectuate the entry of judgment on the Order. Counsel for Jones and his firm recognized the necessity of this additional procedural step and filed a praecipe for entry of judgment on January 9, 2006. **Indeed, it was in direct response to that praecipe that the Prothonotary, on January 9, 2006, entered judgment on the December 30, 2005 Order and sent a Notice pursuant to Pa. R. Civ. P. 236. This was the first and only Rule 236 Notice ever sent in connection with the award of summary judgment.**

As evidenced by the January 9, 2006 docket entry "JUDGMENT ENTERED-NOTICES SENT," the Prothonotary of Schuylkill County now scrupulously complies with the dictates of Rule 236. In that context, it is clear that the prior docket notation "OPINION AND ORDER OF COURT-COPIES MAILED" was not, nor was it intended to be, Rule 236 Notice.

Aside from departing from the express requirements of published procedural rules, the Superior Court's ruling, by failing to follow binding precedent of the state Supreme Court, the body charged pursuant to the state Constitution with exclusive procedural rulemaking powers, Pa. Const. Art. V, section 10(c), explicating those same rules,

violated the principle of *stare decisis*. Indeed the Supreme Court of Pennsylvania last year quoted this Court for the proposition that "stare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Stilp v. Commonwealth*, 588 Pa. 539, , 905 A.2d 918, 1 (2006), quoting *Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479, 2489 (2006).

This Court's discussion of *stare decisis* in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), remains instructive:

> The Court has said often and with great emphasis that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). Although we have cautioned that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision," *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 241 (1970), **it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."** The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). *See also Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (stare decisis ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

Patterson v. McLean Credit Union, 491 U.S. at 172 (emphasis supplied). This Court further noted in Patterson that "'any departure from the doctrine of stare decisis demands special justification.'" *Id.*, quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The *Patterson* Court further emphasized that "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at 172-173, citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

Because formulating rules of judicial procedure, in some States a matter for the Legislature, is a subject allocated by the Pennsylvania Constitution to the Supreme Court and its various Rules Committees, considerations of *stare decisis* are doubly important when examining the state Supreme Court's precedential interpretations of its own procedural rules. *See Commonwealth v. White*, 910 A.2d 648, 866 (Pa. 2006)(Cappy, C.J., dissenting, joined by Baer, J.)(dissent from decision overruling recent decision interpreting Rule of Appellate Procedure governing interlocutory appeals as of right). Calls for amendments to the State's procedural rules are channeled through an orderly rulemaking process, not undertaken on an *ad hoc* basis in the guise of motion practice.

The Superior Court advanced no "special justification" -- indeed no justification at all -- for departing from the Pennsylvania Supreme Court's decision in *Frazier v. City of Philadelphia* in this case. The Respondent's arguments, properly viewed, were at best veiled criticisms of the pertinent rules as

written and as interpreted by the Pennsylvania Supreme Court. The Superior Court had no authority to entertain such arguments, let alone to abrogate rules it had the duty to enforce and to overrule precedent it had the duty to follow. Petitioners' timely appeal was nevertheless quashed as "untimely" on motion of Respondents, an action the Superior Court did have the power to take. Once issued, that court's arbitrary order became, by its very nature, essentially unreviewable.

CONCLUSION

The petition for writ of certiorari should be granted, the Order of the Superior Court of Pennsylvania quashing Petitioners' appeal vacated, and the matter remanded to the Superior Court of Pennsylvania for reconsideration on the merits of Respondents' motion to quash in light of *Frazier v. City of Philadelphia*, *Hepler v. Urban* and *Yeaple v. Yeaple*, Rule 236 and 227.4(2) of the Pennsylvania Rules of Civil Procedure and Rules 108(b), 301(a) and 903(a) of the Pennsylvania Rules of Appellate Procedure.

Respectfully submitted,

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DATED: January 26, 2007

U.S. Const. Amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pa. Const. Art. 5, § 9

§ 9. Right of appeal

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Pa. Const. Art. 5, § 10(c)

§ 10. Judicial administration

* * * *

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and

to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. . . . .

42 Pa.C.S. § 1722(a)(1)

§ 1722. Adoption of administrative and procedural rules

(a) GENERAL RULE.-- The governing authority shall have the power to prescribe and modify general rules governing:(1) Practice, procedure and the conduct of all courts, magisterial district judges and all officers serving process or enforcing orders of any court or magisterial district judge and for admission to the bar and to practice law, and the administration of all courts and the supervision of all officers of the judicial branch, if such rules are consistent with the Constitution of Pennsylvania and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or magisterial district judge, nor suspend nor alter any statute of limitation or repose. All statutes shall be suspended to the extent that they are inconsistent with rules prescribed under this paragraph.

Section 5105(a)(1) of the Judicial Code, 42 Pa. C.S. § 5105(a)(1)

§ 5105. Right to appellate review
(a) General rule.--There is a right of appeal under

this subsection from the final order (including an order defined as a final order by general rule) of every:
(1) Court or magisterial district judge of this Commonwealth to the court having jurisdiction of such appeals.

42 Pa.C.S. § 5501(a)

§ 5501. Scope of chapter

(a) GENERAL RULE.-- An action, proceeding or appeal must be commenced within the time specified in or pursuant to this chapter unless, in the case of a civil action or proceeding, a different time is provided by this title or another statute or a shorter time which is not manifestly unreasonable is prescribed by written agreement.

42 Pa. C.S. § 5502

§ 5502. Method of computing periods of limitation generally

(a) GENERAL RULE.-- The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action accrued, the criminal offense was committed or the right of appeal arose.
(b) IMPLEMENTING COURT RULES.-- Subsection (a) may be made more specifically applicable to particular classes of matters by general rules defining the acts, omissions or events from which the limitation shall be computed. Rules adopted pursuant to this section shall take effect only in the manner provided by section 503(b) (relating to procedures).

42 Pa. C.S. § 5571(a)-(b)

§ 5571. Appeals generally

(a) GENERAL RULE.-- The time for filing an appeal, a petition for allowance of appeal, a petition for permission to appeal or a petition for review of a quasi-judicial order, in the Supreme Court, the Superior Court or the Commonwealth Court shall be governed by general rules. No other provision of this subchapter shall be applicable to matters subject to this subsection.
(b) OTHER COURTS.-- Except as otherwise provided in subsections (a) and (c), an appeal from a tribunal or other government unit to a court or from a court to an appellate court must be commenced within 30 days after the entry of the order from which the appeal is taken, in the case of an interlocutory or final order.

42 Pa. C.S. § 5572

§ 5572. Time of entry of order

The date of service of an order of a government unit, which shall be the date of mailing if service is by mail, shall be deemed to be the date of entry of the order for the purposes of this subchapter. The date of entry of an order of a court or magisterial district judge may be specified by general rules.

Pa. R.A.P. 105

Rule 105. Waiver and Modification of Rules

(a) Liberal construction and modification of rules. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. In the interest of

expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided in Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

(b) Enlargement of time. An appellate court for good cause shown may upon application enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the court may not enlarge the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review.

Pa.R.A.P., Rule 108(a)(1), (b)

Rule 108. Date of Entry of Orders

(a) General rule. (1) Except as otherwise prescribed in this rule, in computing any period of time under these rules involving the date of entry of an order by a court or other government unit, the day of entry shall be the day the clerk of the court or the office of the government unit mails or delivers copies of the order to the parties, or if such delivery is not otherwise required by law, the day the clerk or office of the government unit makes such copies public. The day of entry of an order may be the day of its adoption by the court or other government unit, or any subsequent day, as required by the actual circumstances.

* * * *

(b) Civil orders. The date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given as required by Pa.R.Civ.P.

236(b).
(c) Emergency appeals. Notwithstanding Subdivisions (a) and (b) of this rule, an order subject to Rule 301(e) (emergency appeals) shall be deemed entered for the purposes of these rules when the party intending to appeal has complied with such rule to the extent practicable under the circumstances.

Pa. R.A.P., Rule 903(a)

Rule 903. Time for Appeal

(a) General rule. Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken.

Pa. R.Civ.P. No. 236

Rule 236. Notice by Prothonotary of Entry of Order or Judgment

(a) The prothonotary shall immediately give written notice of the entry of
(1) a judgment entered by confession to the defendant by ordinary mail at the address stated in the certificate of residence filed by the plaintiff together with a copy of all documents filed with the prothonotary in support of the confession of judgment. The plaintiff shall provide the prothonotary with the required notice and documents for mailing and a properly stamped and addressed envelope; and
* * * *
(2) any other order or judgment to each party's attorney of record or, if unrepresented, to each party. The notice shall include a copy of the order or judgment.

* * * *

(b) The prothonotary shall note in the docket the giving of the notice and, when a judgment by confession is entered, the mailing of the required notice and documents.
(c) Failure to give the notice or when a judgment by confession is entered to mail the required documents, or both, shall not affect the lien of the judgment.
(d) The prothonotary may give the notice required by subdivision (a) or notice of other matters by facsimile transmission or other electronic means if the party to whom the notice is to be given or the party's attorney has filed a written request for such method of notification or has included a facsimile or other electronic address on a prior legal paper filed in the action.

Superior Court Internal Operating Procedures, § 65.7, 210 Pa. Admin. Code § 65.7

§ 65.7. Central Legal Staff

Central Legal Staff is an office of the Court created for the purpose of assisting the Court in reviewing and processing motions, preparing memos for the Court as directed, screening cases, certifying cases to advise the Court of apparent conflicts, preparing a newsletter to inform the Court of recent Supreme and Superior Court decisions, and accepting such other responsibilities as may be assigned by the Court or the President Judge.

Superior Court Internal Operating Procedures, § 65.8, 210 Pa. Admin. Code § 65.9

§ 65.8. Composition of Staff

A. The Central Legal Staff is comprised of members of the Bar of the Commonwealth of Pennsylvania and

serves the interests of the Court as a whole and assists the Judges in procedural and substantive matters under the direction of the President Judge.

B. The staff is supervised by the Chief Staff Attorney. The Chief Staff Attorney shall prepare and make available to the members of the Court written Internal Operating Procedures for all aspects of Central Legal Staff's operations.

Superior Court Internal Operating Procedures, § 65.12, 210 Pa. Admin. Code § 65.12

§ 65.12. Initial Review of Docketing Statements

Staff is responsible for the screening of docketing statements filed pursuant to Pa.R.A.P. 3517. These statements are to be initially screened to determine if the appeal is jurisdictionally or procedurally defective. No appeal shall be subject to being quashed on the basis of the docketing statement review alone; rather, if a defect is apparent, a letter shall be addressed to counsel to verify same. Following notification to counsel, the appeal is subject to being quashed by the assigned monthly motions judge.

Superior Court Internal Operating Procedures, § 65.22, 210 Pa. Admin. Code § 65.22

§ 65.22. Motions Review Subject to Motions Panel Disposition

A. Motions to Quash or Dismiss Appeals, Petitions for Permission to Appeal pursuant to Pa.R.A.P. 312, 1301-1323 and 42 Pa.C.S. 702(b), and Petitions for Review pursuant to Pa.R.A.P. 1501 et seq. shall be subject to review and disposition by a panel of three commissioned judges.
B. After a motion subject to this Rule has been filed

by the Prothonotary's office, the Prothonotary shall forward the motion to Central Legal Staff which shall prepare and circulate to the motions panel a legal memorandum and recommendation. Votes thereon shall be due three weeks from the date on which the motion and accompanying document are sent by Central Legal Staff. Votes on cases which have been identified as family law fast track cases shall be due two weeks from the date on which the motion and accompanying documents are sent by Central Legal Staff.

C. If, in reviewing motions to be referred to a motions panel, Central Legal Staff determines that the motion is patently defective or the appeal is clearly defective or can be disposed of based upon established case law, the motion may be presented to the assigned motions judge.

Civil Case: S-759-1993-

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Filings

Date	Filing
02/07/2006	NOTICE OF APPEAL
02/07/2006	REQUEST
02/07/2006	STATEMENT OF MATTERS COMPLAINED OF ON APPEAL
02/07/2006	PROOF OF SERVICE
02/06/2006	OBJECTION
0/06/2006	CERTIFICATE OF SERVICE
02/06/2006	BRIEF IN OPPOSITION TO MOTION
02/06/2006	CERTIFICATE OF SERVICE
02/06/2006	ORDER OF COURT/COPIES MAILED
02/06/2006	ORDER-DENIED
01/18/2006	MOTION FOR RECONSIDERATION
01/18/2006	BRIEF IN SUPPORT OF MOTION
01/18/2006	CERTIFICATE OF SERVICE
01/10/2006	ORDER-DENIED
01/09/2006	PRAECIPE FOR ENTRY OF JUDGMENT
01/09/2006	JUDGMENT ENTERED-NOTICES SENT
01/09/2006	CERTIFICATE OF SERVICE
12/20/2005	OPINION AND ORDER OF COURT -COPIES MAILED
12/30/2005	ORDER-GRANTED
09/26/2005	ANSWER TO MOTION
09/26/2005	CERTIFICATE OF SERVICE
09/26/2005	BRIEF
09/26/2005	CERTIFICATE OF SERVICE
09/07/2005	MOTION TO COMPEL
09/07/2005	BRIEF IN SUPPORT OF MOTION
09/07/2005	CERTIFICATE OF SERVICE
07/28/2005	0RDER OF COURT/COPIES MAILED

07/28/2005	0RDER-STRICKEN FROM TRIAL LIST
07/13/2005	REPLY TO MOTION
07/13/2005	CERTIFICATE OF SERVICE
07/11/2005	REPLY BRIEF
07/11/2005	CERTIFICATE OF SERVICE
06/27/2005	CERTIFICATE OF READINESS
06/16/2005	0RDER OF COURT/COPIES MAILED
06/16/2005	ORDER/HEARING SCHEDULE FOR
06/15/2005	ANSWER TO MOTION
06/15/2005	BRIEF IN OPPOSITION TO MOTION
06/15/2005	CERTIFICATE OF SERVICE
06/15/2005	APPENDIX
06/14/2005	MOTION TO STRIKE MOTION
06/14/2005	BRIEF IN SUPPORT OF MOTION
06/14/2005	CERTIFICATE OF SERVICE
06/14/2005	PRAECIPE FOR ARGUMENT LIST
05/19/2005	ORDER 0F COURT/COPIES MAILED
05/19/2005	ORDER/HEARING SCHEDULE FOR
05/16/2005	PRAECIPE FOR ARGUMENT LIST
05/16/2005	MOTION/SUMMARY JUDGEMENT
05/16/2005	CERTIFICATE OF SERVICE
05/16/2005	BRIEF IN SUPPORT OF MOTION
05/16/2005	CERTIFICATE OF SERVICE
05/16/2005	APPENDIX
05/16/2005	MOTION
05/16/2005	CERTIFICATE OF SERVICE

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY

CIVIL ACTION – LAW

CANOE MANUFACTURING COMPANY and ROBERT ULLMAN,
Plaintiffs

No. S-759-1993

vs.

JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES,
Defendants

John P. McKelligott, Esquire, James P. Peters, Esquire – for Plaintiffs
John R. Warner, Esquire, Alan E. Johnson, Esquire, Walter F. Kawalec – for Defendant

OPINION OF COURT

DOLBIN, J.

The instant matter is before the Court on defendant's Second Motion for Summary Judgment. The procedural history of this aging case is somewhat complex and should be reviewed.

A Complaint in this matter was filed on May 5, 1993 by Plaintiffs Canoe Manufacturing Company and Robert Ullman against Defendants Joseph H. Jones, Esquire and Williamson, Friedberg & Jones hereinafter referred to as the "Jones defendants". At a later time, Plaintiffs joined Meridian Bank and its successors as defendants, hereinafter referred to as the "Bank defendants". The Meridian Bank defendants then filed a counterclaim against the plaintiffs. A second amended Complaint was filed on

August 20, 1993. After discovery was completed, both the Jones defendants and the Bank defendants filed separate motions for summary judgment. This Court granted defendants earlier Motion for Summary Judgment on the ground that the statute of limitations had expired. The other grounds raised in that first Motion were not addressed, inasmuch as the Court thought that the granting of the motion on those grounds rendered moot all other arguments. Plaintiffs and the Bank defendants settled the claims and counterclaims between them, leaving only the Jones defendants remaining. The Superior Court in its 2-1 Opinion of Febntary 16, 2004 reversed this Court, and remanded the case to the trial court for trial.[1] Subsequently, on May 16, 2005 defendants filed a Second Motion for Summary Judgment.

The plaintiff's theory is that defendant Joseph H. Jones, Esquire, a partner of the law firm Williamson Friedberg & Jones, while acting both as counsel for plaintiff and as an officer of the Meridian Bank committed an act of professional negligence against plaintiff or breached his fiduciary duty to his client. The facts pertinent to our inquiry demonstrate that plaintiff was in the business of manufacturing apparel at a factory in Pine Grove, Schuylkill County. In order to conduct its business, plaintiff was required to obtain financing for its operation. Plaintiff contacted Meridian Bank and Meridian Commercial Credit Corporation in the person of Knute Albrecht, President and CEO of Meridian Commercial Credit Corporation. In his letter of March 31, 1986 Mr. Albrecht set forth the terms of the Bank's

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[1] The Superior Court without explanation also "suggest"ed that the case be assigned to a different judge upon remand. Hence, this writer's appearance in the case.

understanding with the plaintiff.[2] In spite of certain monies lent by the Bank to plaintiff, plaintiff's business nevertheless failed and was liquidated in Bankruptcy. In order to have survived and succeeded in business, plaintiff would have required more financing than the Bank was then willing to advance.

Plaintiff's theory is that the letter constituted a contract, and that defendant Jones committed a negligent failure or conflict of interest in which he sacrificed the interest of his client (the plaintiff) in favor of the Bank on whose Board of Directors he sat. If the letter was a contract, the plaintiff had certain rights which he was entitled to claim; if the letter was not a contract, plaintiff had no contractual leverage with the bank. If the letter was a contract, defendant Jones, as attorney for the plaintiff, either should have worked with the plaintiff in asserting his contractual rights or should not have breached his fiduciary relationship with the plaintiff by allowing the interests of the Bank to be superior to those of his client.

We hold that the acts of the defendant Jones, even if proven to a certitude to have been tortious, cannot constitute a factual cause of the economic harm suffered by the plaintiff, unless the plaintiff had enforceable contractual rights which were violated by the negligence or misfeasance of defendant Jones.[3]

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[2] Although the letter was addressed to Mr. Robert Ullman, President of Canoe Manufacturing at the Pine Grove address of the Company, Mr. Ullman averred that he had never seen the letter until the same was revealed to him at a deposition of defendant Jones on May 13, 1991.

[3] Plaintiff's counsel at argument disagreed with this formulation, asserting that even if the letter was found not to be a contract, plaintiff should still be able to present his case to a jury on the theory of punitive damages, legal malpractice and breach of fiduciary duty. We are unable to find any basis for this assertion, and would not allow such matters to be submitted to a jury.

The only way in which such enforceable contractual rights against Meridian could have come into existence is by means of the Albrecht letter of March 31,1986. The alleged negligence or misfeasance of defendant Jones could not have adversely affected the plaintiff, unless the plaintiff had enforceable rights in the first place. In fact, Jones's conduct, whatever it was, could not even be deemed tortious unless the letter created or conferred rights on his client, Canoe. If the letter was of ancillary concern or was only a memorandum, and, therefore, just another leaf of paper in what is presumably a voluminous file, it would grant no specific actionable rights to plaintiff and then the failure of Jones to bring it to Canoe's attention is of no consequence to Canoe.

Thus, plaintiff's entire cause of action stands or falls on whether or not the letter can be construed to be an enforeceable contract obligating the Bank to do certain things in the future. We believe that it cannot be so construed.[4]

A fair reading of the letter demonstrates that it was not a contract, but rather a list of events and matters which could take place if other things were first to happen. A fair reading of the letter, which appears in many places and as Exhibit "F" in Defendants' Appendix of Exhibits, demonstrates that it is an agreement to agree, a roadmap of where the

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Again, in order to submit anything to a jury, it must first appear that defendants' conduct was a **factual cause** of harm to the plaintiff.

[4] In opposing defendants' motion for Summary Judgment, plaintiffs have enlisted the impressive aid of Professor John E. Murray, Jr., an authority on general contract law and an expert as to the legal interpretation of the March 31, 1986 letter. While respecting Dr. Murray's conclusions, we must nevertheless disagree with them, and assert rather the Court's duty to interpret writings (as either a contract or not) as a matter of law, unaided by factual expert opinion. See e. g. Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986).

parties could and would go in the usual course of events and if unspecified other obligations were entered into, that is, if certain other things occur. To constitute a contract the letter would have to set forth clear obligations for each of the parties. The letter does not do so. Although some terms of the parties' rights and obligations are established, many are unresolved and left for agreement to a future time. Because of that fact, the letter cannot form the basis of assent, the basis of a binding contract. GMH Assoc., Inc. v Prudential Realty Group, ___ Pa.Super. ___, 752 A.2d 889 (2000). The letter merely states that its purpose is to enable the Meridian Credit Corp to advance a portion of the new funds ...in anticipation of a settlement. Item 9 of the letter states that "[d]ocumentation will include other standard terms and conditions which must be satisfactory to us." Item 10 states, "The above is not meant to be all-inclusive, but merely a summary of the basic terms." The letter calls itself a "brief outline," so that the Credit Corporation may advance some funds "in anticipation of settlement." Because of the many missing elements and the intention of the letter to look to the future, we find that it does not constitute a binding contract.[5] On this basis alone we are granting defendants' motion for summary judgment.

Defendants have also argued that Summary Judgment is warranted on the basis of integration of the March 31, 1986 letter into the April 18, 1986 Loan

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[5] Plaintiffs have hired experts in an attempt to aid the court in the interpretation of the March 31 letter as a contract. We do not believe that the plaintiff can lift his case by his bootstraps from a legal question to a factual one merely by the hiring of an expert. The question of whether the letter is a contract, or not, is a pure question of law to be determined by the Court. The fact that an expert has been hired and renders advice to the Court does not automatically create a question for a jury to decide. See Mannella v. Pittsburgh, 334 Pa. 396, 402, 6 A.2d 70, 73 (1939); Maust v. Creasy, 42 Pa.Super. 633 (1910).

Settlement. We disagree. If Jones had indeed committed a tort or a breach of fiduciary duty, his wrongdoing would survive the later loan settlement, if the letter itself had created any contractual rights. We, therefore, deny defendants' motion on the basis of subsequent integration.

Additionally, defendants argue that Summary Judgment is warranted on the basis that when the plaintiff was subsequently discharged in Bankruptcy Court, there was no abandonment by the trustee of plaintiff's claim against Jones, so that the claim against Jones was an asset of the debtor (plaintiff herein) that was in fact discharged. We hold that such a discharge without abandonment did in fact occur, and that Summary Judgment in favor of the defendants could be granted also on this ground.

Accordingly, we are compelled to enter the following:

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY

CIVIL ACTION — LAW

CANOE MANUFACTURING COMPANY and ROBERT ULLMAN,

Plaintiffs

No. S-759-1993

vs.

JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES,

Defendants

John P. McKelligott, Esquire, James P. Peters. Esquire — for Plaintiffs
John R. Warner, Esquire, Alan E. Johnson, Esquire, Walter F. Kawalec — for Defendant

ORDER OF COURT

AND NOW, this 30 day of December 2005, Defendants' Second Motion for Summary Judgment is granted. No genuine issue of material fact exists, and Defendants are entitled to judgment as a matter of law.

BY THE COURT:

/S/
CYRUS PALMER DOLBIN,
Judge

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, P.C.

By:

John R. Warner Alan E. Johnson Walter F. Kawalec, III

Pa. I.D. 40389 Pa. I.D. #89690 Pa. I.D. #82783

* * * *

Attorneys for Defendants, Joseph H. Jones, Esquire and Williamson, Friedberg & Jones

IN THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY, PENNSYLVANIA

CANOE MANUFACTURING and ROBERT ULLMAN, CIVIL ACTION--LAW

NO. S-759-93

Plaintiffs

vs.

JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES

Defendants

PRAECIPE TO ENTER JUDGMENT

TO THE PROTHONOTARY:

Pursuant to the December 30, 2005 Order granting Defendants' Second Motion for Summary Judgment, kindly enter judgment against Plaintiffs, Canoe Manufacturing Company and Robert Ullman, and in favor of Defendants, Joseph H. Jones, Esquire and Williamson, Friedberg & Jones in the above matter.

Respectfully submitted,

MARSHALL, DENNEHEY,
WARNER, COLEMAN &
GOGGIN

By:

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Attorneys for
Defendants, Joseph H.
Jones, Esquire and
Williamson, Friedberg &
Jones

IN THE COURT OF COMMON PLEAS OF
SCHUYLKILL COUNTY, PENNSYLVANIA
CIVIL DIVISION

Plaintiff(s) File Number S-759-1993

M ROBERT ULLMAN
CANOE MANUFACTURING COMPANY
MERIDIAN BANK

Defendant(s) NOTICE OF FILING JUDGMENT

JOSEPH ATTORNEY JONES
WILLIAMSON FRIEDBERG & JONES
MERIDIAN BANK
CORESTATES BANK NA
FIRST UNION NATIONAL BANK
CANOE MANUFACUTRING CO INC
M ROBERT ULLMAN
KAYE G ULLMAN
WACHOVIA BANK

CANOE MANUFACTURING COMPANY

Notice is hereby given that a Judgment in the above-captioned matter has been entered against CANOE MANUFACTURING COMPANY in the amount of $ 0.00 on January 9, 2006.

PROTHONOTARY

If you have any questions regarding this Notice, please contact the filing party:

JAMES P. PETERS, ESQ.
EIGHT SAINT ALBANS AVE

2ND FLOOR
NEWTOWN SQUARE PA 19073
610-353-8531

M ROBERT ULLMAN
1616 HILL ROAD
READING PA 19602

JAMES P. PETERS, ESQ.
EIGHT SAINT ALBANS AVE
2ND FLOOR
NEWTOWN SQUARE PA 19073
610-353-8531

* * * *

CANOE MANUFACTURING COMPANY and ROBERT ULLMAN,	:	IN THE COURT OF COMMON PLEAS OF OF SCHUYLKILL COUNTY
Plaintiffs	:	
	:	CIVIL ACTION — LAW
v.	:	
	:	NO. S-759-93
JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES, Defendants	:	

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that Canoe Manufacturing Co., Inc. and M. Robert Ullman, the Plaintiffs herein, hereby appeal to the Superior Court of Pennsylvania from the Judgment entered in this matter on the 9th day of January, 2006. This Judgment has been entered in the docket as evidenced by the attached copy of the docket entries herein.

LAW OFFICE OF JOHN P. McKELLIGOTT, Esq.

By: /S/ John P. McKelligott
John P. McKelligott, Esq.
Attorney for Plaintiffs

Of counsel:
James P. Peters, Esq.

SUPERIOR COURT OF PENNSYLVANIA
Civil Docketing Statement

Pursuant to Pa.R.A.P. 3517, you must complete and return this form and attachments to the Prothonotary of the Superior Court by March 2, 2006. A completed copy of this form must also be provided to the appellee. THIS FORM IS FOR CIVIL APPEALS ONLY. If this is not a civil appeal, notify the Superior Court Prothonotary and the correct form will be provided to you.

A. Case Identification

1. Case Caption: Canoe Manufacturing , et al. v. Jones, J., et al
2. Superior Court Docket No.: 302 MDA 2006
3. Party or parties filing appeal:

Appeal of: CANOE MANUFACTURING CO., INC. & M. ROBERT ULLMAN

B. TIMELINESS OF APPEAL (Check only those which apply)

(✓) Date of judgment or order appealed from JANUARY 6, 2006
(✓) Date of Rule 236 notice JANUARY 9, 2006
(✓) Date praecipe for judgment filed JANUARY 9, 2006
(✓) Date judgment filed JANUARY 9, 2006
(✓) Date notice of appeal filed FEBRUARY 7, 2006
(✓) Was reconsideration in lower court requested?
(✓) Yes ( )No
Was it expressly granted? ( ) Yes (✓) No
(give date) DENIED 2/6/06

C. APPEAL FROM THE TRIAL COURT

Attach copies of the following: (1) the trial court's

judgment, order or decree appeals from which this appeal is taken; (2) notice of appeal; (3) trial court docket; and (4) trial court opinion, if available.

1. Is the order appealed from a final appealable order? (✓)Yes ( )No (Specify rule and subsection governing finality (e.g. Pa.R.A.P. 301, 313, 341)
PA. R.A.P. 301(d), 341(a), (b)(1) &(2)
2. If the order is not a final order:
a. Is the order appealable as of right under Pa.R.A.P. 311?
( )Yes ( ) No (specify which subsection)
b. Was permission to appeal granted pursuant to:
(i) Pa.R.A.P. 1311? ( ) Yes ( ) No Misc. Docket. No.
(ii) Pa.R.A.P. 1501 et seq? ( ) Yes ( ) No Misc. Docket. No. __

3. How have ~~issues been~~ preserved? (e.g., pre-trial motions, timely objection motion to remove non-suit, petition to strike/open)
BY MOTION BELOW & BY ANSWERS OPPOSING MOTIONS FILED BY THE DEFENDANTS-APPELLEES

D. NATURE OF DISPOSITION BELOW

Below, you will find a list of possible procedural dispositions in the court below. List the procedural disposition applicable to this appeal using the corresponding letter. If the disposition used in the lower court does not appear on the list provided, please type or print the nature of the disposition below.

A. Change of Venue
B. Decree (include date of decree with corresponding letter B)
C. Default Judgment

D. Dismissal for failure to state a claim
E. Dismissal for failure to prosecute
F. Dismissal for lack of jurisdiction
G. Non-pros under local rule
H. Grant/denial of injunction
I. Grant/denial of declaratory relief
J. Judgment after bench trial
K. Judgment after jury verdict
L. Judgment on the pleadings
M. Motion to remove non-pros
N. Motion to remove non-suit
O. Preliminary objections
P. Summary judgment (if summary judgment, include which parties and/or claims remain in the trial court) NO CLAIMS REMAIN IN THE TRIAL COURT
Q. Arbitration
R. Grant/denial of petition for special relief
S. Other disposition (specify) DENIAL OF MOTION TO STRIKE DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT AS UNREASONABLY DELAYING TRIAL AFTER 12 YEARS, & DENIAL/REFUSAL TO GRANT PLS' MOTION FOR RECONSIDERATION ASSERTING PREJUDICE DUE TO DEFENDANTS' PIECEMEAL & UNDULY DELAYED MOTIONS FOR SUMMARY JUDGMENT

SUBSTANTIVE CASE TYPE

A. Action to quiet title
B. Asbestos
C. Contempt
D. Contract Dispute
E. Damages
F. Defamation
G. Easement
H. Employment
I. Ejectment

J. Emotional Distress, Intentional Emotional
K. Emotional Distress, Negligent
L. Equity
M. Estates or Trusts
N. Garnishment
O. Injunction
P. Insurance
Q. Landlord/Tenant
R. Legal Malpractice
S. Libel
T. Medical Malpractice
U. Mechanic's Lien
V. Mortgage Foreclosure
W. Motor Vehicle Trespass
X. Negligence
Y. Probate
Z. Products Liability
AA. Property Dispute
BB. Replevin
CC. Trespass
DD. Wrongful Death/Survival Statute

E. TYPE OF CASE

On Page 3 you will find a list of substantive case types. List the substantive case type(s) involved in this Appeal using the corresponding letter(s). List as many as apply. If your case type does not appear on the list provided, please type or print the substantive type of case involved in this appeal.
R, X, CC (BREACH OF FIDUCIARY DUTY)

F. RELATED CASE

List all related cases pending in any court (e.g., co-defendants, cross appeal, cross-claims, counterclaims, bankruptcy proceedings or other appeals):

CASE NAME COURT CASE NO.

TYPE OF CASE
THERE ARE NO RELATED CASES PENDING

Docket No. of cross appeal

G. DESCRIPTION OF APPEAL (If necessary attach additional pages for completion of 1 and 2)

1. Brief description of action and result below:
   SEE ATTACHED SHEET
2. Issues to be raised on appeal:
   SEE ATTACHED SHEET

HAVE YOU ATTACHED: Order from which appeal is taken? (✓) Yes ( ) No
Notice of appeal? (✓) Yes ( ) No
Trial court docket? (✓) Yes ( ) No
Trial court opinion? (✓) Yes ( ) No

IF THIS DOCKETING STATEMENT IS NOT FILLED OUT IN ITS ENTIRETY WITH ALL REQUESTED DOCUMENTS ATTACHED, YOU MAY BE SUBJECT TO DISMISSAL OF THE APPEAL. See Pa.R.A.P. 3517, amended June 5, 2001, effective September 1, 2001.

Signature John P. McKelligott Date 3/1/06
Print Name JOHN P. McKELLIGOTT, ESQ.
Atty. I.D. No. 16221
E-Mail Address jpmesq_200@YAHOO.COM

G.1. Brief description of action and result below:

This is a reach of fiduciary duty and legal malpractice action. Plaintiffs are Canoe Manufacturing Co., Inc., an apparel manufacturer and once the second-largest employer in Schuylkill County, and M. Robert Ullman, Canoe's President and CEO. Defendants are Joseph Jones, Esq. and his law firm; Mr. Jones is the attorney who represented Canoe in its effort to secure new financing from Meridian Commercial Credit Corp. ("MCCC") to help Canoe weather a cash crunch in 1985 and 1986.

The controversy arises out of Canoe's efforts, in 1985 and 1986, to borrow additional funds from Meridian Commercial Credit Corp. ("MCCC") to enable it to manufacture apparel fill orders already booked for 1986. In the course of seeking this new funding, Plaintiffs retained Joseph Jones, Esq. and his firm (the Defendants) to represent them, to participate in and assist with negotiations and to draft or review documents in connection with implementing the new financing. In the course of the negotiations seeking new financing, the bank sought additional collateral, and a "commitment letter" agreeing to furnish new financing in return for additional collateral was (after approval and authorization by MCCC's Loan Committee) issued to Canoe; this "commitment letter" was signed by Knute Albrecht, President of MCCC, and countersigned on Canoe's behalf by M. Robert Ullman, Canoe's President.

In the course of drawing up the documentation for securing additional collateral, language was inserted defining Canoe's "borrowing base" in such a fashion as to secure, for the bank, the additional collateral from Canoe but to remove the bank's obligation to extend additional financing. Initially, Canoe's attorneys – the Defendants/Appellees

herein – opposed the inclusion of such language on the grounds that such language was prejudicial to Canoe and inconsistent with the "commitment letter." However, in the end, that language was included in the final documents, Canoe did furnish the additional collateral, and Canoe did not receive additional financing. And Canoe failed.

Plaintiffs/Canoe assert legal malpractice against the attorneys for failing to ensure that the final documents were consistent with the "commitment letter" and for failing to advise Plaintiffs/ Appellants that, if they signed the final documents, they would be putting up additional collateral without securing in return the new financing that they had bargained for.

Plaintiffs/Canoe assert breach of fiduciary duty against the attorneys on the grounds that the attorneys knew (or should have known) that the final documents were prejudicial to Canoe and inconsistent with the "commitment letter," that the attorneys nonetheless permitted Plaintiffs/ Canoe to proceed to sign the final documents and put up the additional collateral without getting the new financing, and Plaintiffs/Canoe submit that the attorneys (or some or one of them) so acted in order to protect a corrupt and conflicting interest – namely, the interest that Joseph Jones, Esq. owed as a Director of Meridian Bank (the parent of MCCC) to protect the bank's interests. Plaintiffs submit that the interest of Jones as a Meridian Bank Director came into irreconcilable conflict with his duty to zealously represent Canoe, et al. in their quest to borrow funds from Meridian Bank's subsidiary when Meridian Bank determined to secure additional collateral to replace certain prior "guarantees" of existing Canoe (and other) loans from a third party financing institution, "guarantees" that posed an FDIC regulatory problem for Meridian Bank.

Plaintiffs/Canoe contend that the attorney Defendants/Appellees never advised them that, in signing the final loan restructuring documents, they were putting up additional collateral but not getting the new financing; that they would never have done so if they had known that they would not get the new financing because, if Canoe were to fail, they would have let it fail without risking the additional collateral; and that the knowing failure of their attorneys to so advise them arises out of attorney Jones's conflict of interest, and his apparent choice to prefer Meridian Bank's commercially valuable interests to the interest of the clients who were paying his bills. On this basis, Plaintiffs/Canoe assert breach of fiduciary duty by one or more of the attorney defendants.

In 1999, the Defendants[1] moved for summary judgment asserting numerous grounds including the statute of limitations. Although numerous grounds were asserted for summary judgment, the Court of Common Pleas for Schuylkill County, per the Hon. J. Michael Stine, on December 22, 2000, granted summary judgment only on the basis of the statute of limitations. Because this ruling left open certain claims, no appeal was filed until Plaintiffs/Canoe resolved their differences with the parties other than the attorney Defendants; once that was accomplished, Plaintiffs/Canoe filed a Praecipe for Entry of Judgment and appealed the matter to the Superior Court. On February 16, 2004, the Superior Court reversed and remanded the decision of the Court of Common Pleas for

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[1] At the time, Meridian Bank and MCCC (or their successors) were also parties Defendant, in addition to the attorney Defendants. Plaintiffs have subsequently resolved their differences with Meridian Bank and MCCC (and their successors), leaving the attorney Defendants as the remaining parties herein.

Schuylkill County granting summary judgment to Defendants on the basis of the statute of limitations. The Superior Court remanded this case to Schuylkill County for trial, and it included the unusual suggestion that the matter be assigned to a different Judge in Schuylkill County.

The Attorney Defendants then petitioned the Supreme Court of Pennsylvania for Allowance of Appeal. After that Petition was denied, the case was remanded to the Court of Common Pleas for Schuylkill County. Instead of Judge Stine, this time the case was assigned to the Hon. C. Palmer Dolbin.

Back in the Common Pleas Court of Schuylkill County, the Attorney Defendants renewed their quest for Summary judgment by filing a Second Motion raising new claims for Summary Judgment and reasserting the open grounds left over from their first such Motion (alleged release and collateral estoppel/res judicata based upon a prior federal court litigation). For the first time, they raised three new issues: (1) that Plaintiffs have no rights herein because the March 31, 1986 "commitment letter" is only an unenforceable "agreement to agree"; (2) that the March 31, 1986 "commitment letter" is merged into the subsequent loan restructuring final agreements of April 18, 1986, and thus that the March 31, 1986 "commitment letter" is of no legal significance; and (3) that consideration of the issues raised by Plaintiffs/Canoe herein is precluded by the final decree issued in the Canoe Manufacturing Co., Inc. bankruptcy proceeding.

Immediately following service of the Attorney Defendants' Second Motion for Summary Judgment, Plaintiffs/Canoe moved to Strike the Second Motion for Summary Judgment on the grounds that, in violation of Pa.R.C.P. 1035.2, it

posed "unreasonable delay" in bringing this case to trial. In claiming "unreasonable delay", Plaintiffs/Canoe asserted that the case was at the time 12 years old[2], it dealt with events occurring 20 years earlier[3], that the primary witnesses were elderly such that the interests of justice required the case to proceed promptly to trial[4], that prejudice had already occurred to all parties herein due to the passage of time[5], and that the interests of justice required the assignment of this case for trial without further delay. Further, Plaintiffs/Canoe submitted that, to the extent that the Attorney Defendants felt that they had grounds for defense as asserted in their Second Motion for Summary Judgment, such defenses could be raised at trial without prejudice to the Attorney Defendants.

The Court denied Plaintiffs/Canoe's Motion to Strike on June 16, 2005, before response was required from the Attorney Defendants.

Plaintiffs/Canoe opposed the Attorney Defendants' Second Motion for Summary Judgment and, after considerable briefing and submission of exhibits on both sides, the matter was argued in July, 2005. No transcript was made

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[2] The case was filed in 1993.

[3] The events at issue herein occurred in 1985 and 1986.

[4] The primary witnesses are Mr. Jones, who is more than 80 years old, and Mr. Ullman, who is 76. While both gentlemen are in good health, neither is young, and Mr. Ullman, in January, 2006, suffered a heart attack.

[5] In approximately 2003, Home Insurance Company, the professional liability insurer for the Attorney Defendants herein, became insolvent and passed into reorganization in the State of New Hampshire. Plaintiffs/Canoe contended that this occurrence constituted prejudice to all parties herein due to the excessive passage of time.

of this proceeding.

On December 30, 2005, the Court of Common Pleas for Schuylkill County, per the Hon. C. Palmer Dolbin, granted the Attorney Defendants' Second Motion for Summary Judgment on the grounds of the alleged "agreement to agree" and the preclusion of Plaintiffs' claims by the final Decree entered years ago in the Canoe Bankruptcy proceeding. The Court denied the Attorney Defendants' Second Motion for Summary Judgment insofar as it was based on the doctrine of merger. The Court noted that, when the Attorney Defendants filed their Second Motion for Summary Judgment, they reasserted the open grounds from their First Motion for Summary Judgment; however, the Court did not address those grounds in its Order and Opinion, thereby leaving them open to be reasserted again in the future in the event that Plaintiffs/Canoe succeed on this appeal and secure the remand of this case to the Court of Common Pleas.

Thereafter, on January 9, 2006, upon Praecipe of the Attorney Defendants, the Court entered Judgment herein in favor of Defendants, and against Plaintiffs. On January 18, 2006, Plaintiffs/Canoe moved for Reconsideration asserting prejudice from the Court's denying the Motion to Strike and leaving open the undecided issues left over from the Attorney Defendants' First Motion for Summary Judgment. Plaintiffs/Canoe also asserted that the Court's ruling on "agreement to agree" constituted mistake of law, that it wrongly applied the case law of Pennsylvania and wrongfully invaded the jury's province, and that it incorrectly analyzed this matter on the basis of contract law when the causes of action asserted herein were tort causes of action for professional negligence/legal malpractice and breach of fiduciary duty.

Further, Plaintiffs/Canoe asserted mistake of law in that the Court misinterpreted the Bankruptcy Decree and mistook causes of action "abandoned" in the bankruptcy proceeding. Equally, Plaintiffs/Canoe asserted mistake of law in that the Canoe Bankruptcy Decree cannot dispose of Mr. Ullman's causes of action herein since he was not a party to the Canoe bankruptcy proceeding.

On February 6, 2006, the Attorney Defendants opposed Plaintiffs/Canoe's Motion for Reconsideration.

On February 6, 2006, the Court of Common Pleas for Schuylkill County denied Plaintiffs/Canoe's Motion for Reconsideration.

On February 7, 2006, Plaintiffs/Canoe filed their Notice of Appeal in the Court of Common Pleas for Schuylkill County, along with associated appeal papers.

G.2 Issues to be raised upon appeal:

1. The Court committed error of law in granting, per the Order of December 30, 2005, Defendants' Motion for Summary Judgment on the basis that the letter of March 31, 1986 did not constitute an enforceable contract, and that accordingly the Plaintiffs have no rights herein.

2. The Court committed error of law in granting, per the Order of December 30, 2005, Defendants' Motion for Summary Judgment on the basis that the Final Decree in Bankruptcy, entered by the U.S. District Court for the Eastern District of Pennsylvania in the Canoe Manufacturing Co., Inc. bankruptcy proceedings, deprived this Court of jurisdiction of this matter or otherwise precluded Plaintiffs from pursuing their claims herein.

3. The Court committed error of law in denying, per its Order of June 16, 2005, Plaintiffs' Motion to Strike Defendants' Second Motion for Summary

Judgment on the grounds that proceeding with such motion at that time amounted to unreasonable delay in bringing this case to trial, in violation of Pa.R.C.P.1035.2.

4. Whether, in the event of remand of this case for trial after appeal, Plaintiffs should be granted a change of venue on the grounds that there no longer exist reasonable grounds to believe that Plaintiffs can receive a fair and timely hearing of their claims in the Court of Common Pleas for Schuylkill County because, inter alia, the Court failed or refused, in its Order of December 30, 2005, to decide all open issues of summary judgment herein[6], and because the Court denied Plaintiffs' Motion to Strike Defendants' Second Motion for Summary Judgment as constituting unreasonable delay in bringing the matter to trial — a ruling which, among other things, potentially allows Defendants to hereafter again renew their Summary Judgment claims piecemeal to force Plaintiffs into the necessity of potentially two more appeals of this matter before the case is permitted to proceed to trial:

a) As acknowledged in the Opinion of December 30, 2005, issues raised by Defendants in 1999 in their First Motion for Summary Judgment, but not decided at that time, and renewed by Defendants in this Second Motion for Summary Judgment, were before the Court at the time it prepared its Order and Opinion of December 30, 2005, yet it did not decide those matters[7] before it

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[6] The undecided issues are the issues first raised by Defendants in their First Motion for Summary Judgment (which was filed October, 1999), which issues are as yet undecided by the Court of Common Pleas of Schuylkill County after two rounds of consideration of Defendants' Motions for Summary Judgment.

[7] These open issues include Defendants' contention that release language included in certain bankruptcy proceeding "Cash Collateral" agreements released Plaintiffs' claims herein, and Defendants' contention that Plaintiffs' claims herein were

which were left over undecided from the time of the Defendants' First Motion for Summary Judgment;

b) The case was at the time 12 years old, having been filed in May, 1993;

c) The controversy herein involves matters occurring in 1986 -- matters approximately 19 years earlier at the time the Court denied Plaintiffs' Motion to Strike;

d) The primary witnesses, Joseph Jones, Esq. and M. Robert Ullman, Defendant and Plaintiff herein, are over 80 and over 76 respectively at this moment in time, thus being of an age such that further significant passage of time is prejudicial as a matter of law;

e) Prejudice has already occurred herein due to the passage of time in that, in approximately 2000 or 2001, Defendants' professional liability insurer, Home Insurance Company, filed for insolvency and went into reorganization under the laws of the State of New Hampshire;

f) Defendants' first moved for Summary Judgment on several grounds in October, 1999, and their Motion was granted on the sole grounds of the statute of limitations in December, 2000;

g) Plaintiffs thereafter appealed the grant of Summary Judgment to the Superior Court, which reversed the matter and remanded the case for trial, suggesting that upon remand the matter be assigned to a different trial Judge;

h) Defendants thereupon filed a Petition for Allowance of Appeal, which Petition was opposed by Plaintiffs and denied by the Supreme Court of Pennsylvania, resulting in the remand of this case to

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precluded by Orders entered in the U S. District Court for the EasternDistrict of Pennsylvania in a proceeding commenced by Mr. Ullman (not Canoe) pursuant to the doctrines of res judicata and/or collateral estoppel. Plaintiffs opposed Defendants' requests for Summary Judgment on all of these issues.

the Court of Common Pleas for Schuylkill County on November 16, 2004;

i) The Plaintiffs' contentions herein include serious contentions of conflict of professional interest and intentional, and even corrupt, breach of fiduciary or professional duty — contentions which necessarily must be personally and professionally repugnant to Defendants beyond the strictures of their potential financial exposure herein;

j) Defendants are prominent in the practice of law in Schuylkill County, having extensive contacts in the business, legal and Court communities of Schuylkill County, and they are believed to have significant influence within such communities;

k) By refusing to decide all Summary Judgment issues which were before it, which issues were left open after decision on the First Motion for Summary Judgment, and when such open issues were explicitly renewed by Defendants in their Second Motion for Summary Judgment, the Court leaves open the possibility for Defendants to renew their claims for Summary Judgment a third time herein if Plaintiffs should prevail upon appeal and succeed in having this case remanded for trial — thereby engendering an unreasonable further delay in bringing this matter to trial;

1) The Court's conduct of deciding Summary Judgment issues piecemeal, thereby prolonging the matter of bringing this case to trial beyond 12 years or more, and thereby raising the possibility that Defendants could again renew these Summary Judgment Motions, get one ground for Summary Judgment granted and force Plaintiffs to undergo the possibility of a third and even fourth round of appeals before bringing this matter to trial; and

m) Plaintiffs submit that such delay, as documented in this record, amounts to prejudicial delay as a matter of law and justifies the supervisory intervention of the appellate courts of Pennsylvania.

In the
Superior Court of Pennsylvania

302 MDA 2006

CANOE MANUFACTURING COMPANY
and ROBERT ULLMAN,
Plaintiffs/Appellants

v.

JOSEPH H. JONES, ESQUIRE and
WILLIAMSON, FRIEDBERG & JONES,
Defendants/Appellees

MOTION OF DEFENDANTS/APPELLEES,
JOSEPH H. JONES, ESQUIRE and
WILLIAMSON, FRIEDBERG & JONES,
TO QUASH PLAINTIFFS' APPEAL

Defendants/Appellees, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones (hereinafter "moving defendants"), by and through their attorneys, John J. Hare, Esq., Alan E. Johnson, Esq., and Marshall, Dennehey, Warner, Coleman and Goggin, respectfully move this Honorable Court to quash plaintiffs' appeal, and in support thereof aver as follows:

1. "Upon review of an appeal, [this Court's] first task is to determine whether the matter is properly before [it]....It is well-established that the failure to file a timely appeal will divest this Court of jurisdiction." Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1198 (Pa. Super. 1997)(citations omitted).

2. By way of introduction, this Motion presents a straightforward issue of appellate jurisdiction, namely, whether plaintiffs filed a timely appeal from the trial court's Order of

December 30, 2005, which awarded summary judgment to moving defendants and disposed of all remaining claims and all remaining parties. Since the docket establishes beyond doubt that plaintiffs did not appeal until February 7, 2006, their appeal was clearly untimely and this Court lacks jurisdiction to proceed. Therefore, while this case has a complicated procedural history, it must now be dismissed on the simple basis that plaintiffs' appeal was untimely.

3. This appeal emanates from the Court of Common Pleas of Schuylkill County, Civil Action No. S-759-1993. (See Exhibit "A," Docket Entries).

4. On May 5, 1993, plaintiffs commenced this civil action via writ of summons. (Id.).

5. In their subsequent Second Amended Complaint, which was filed on August 20, 1993, plaintiffs named as defendants the moving defendants and Meridian Bank and its successors (hereinafter "the Meridian defendants"). (See Exhibit "A," Docket Entries).[1]

6. Plaintiffs and the Meridian defendants ultimately settled all claims and counterclaims between them and, by Stipulation approved by the trial court and filed on March 31, 2003, they confirmed that all claims between them had been resolved and dismissed. (See Exhibit "B," Stipulation).

7. The settlement between plaintiffs and the Meridian defendants left the moving defendants as the only defendants in the case.

8. On May 16, 2005, moving defendants filed a Motion for Summary Judgment with respect to all

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[1] While plaintiffs' precise theory of liability is not relevant to this Motion, their Complaint (and subsequent Amended Complaints) asserted claims of professional negligence and breach of fiduciary duty against moving defendants in connection with plaintiffs' attempts to borrow money from Meridian Commercial Credit Corporation.

claims against them. (See Exhibit "C," Moving Defendants' Motion for Summary Judgment).

9. By Order dated December 30, 2005, the trial court granted the moving defendants' Motion for Summary Judgment, and it entered judgment in favor of moving defendants and against plaintiffs. (See Exhibit "D," Order and Opinion of December 30, 2005).

10. The Order was docketed on December 30, 2005 and Rule 236 Notice was sent the same day. (See Exhibit "A," Docket Entries, p. 2; containing the notation "COPIES MAILED").

11. Pennsylvania Rule of Appellate Procedure 341(b) defines a final order as "any order that ... (1) disposes of all claims and of all parties[.]" Pa.R.A.P. 341(b)(1).

12. Pursuant to Rule 341, an Order granting summary judgment disposing of all claims and all parties is clearly final and appealable. See e.g., Feidler v. Morris Coupling Co., 784 A.2d 812, 815 (Pa. Super. 2001)("Since the order granting summary judgment disposed of the entire matter, the order itself was final and appealable.")(emphasis added).

13. Pennsylvania Rule of Appellate Procedure 903(a) provides that an appeal "shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a).

14. Thus, plaintiffs had 30 days, or until January 29, 2006, to file an appeal from the Order of December 30, 2005. Tohan, 696 A.2d at 1200 ("It is well-established that an order granting summary judgment is final and appealable. Therefore, to preserve the right to appeal once summary judgment is granted, an appeal must be filed within thirty (30) days after the entry of that order.")(citations omitted).

15. Plaintiffs filed their appeal on February 7, 2006, thirty-nine (39) days after the trial court granted summary judgment. (See Exhibit "A," Docket Entries).

16. Thus, plaintiffs appeal was clearly untimely and, as a result, this Court lacks appellate jurisdiction. See In re Trust Under Deed of Green, 779 A.2d 1152, 1157 (Pa. Super. 2001), appeal denied, 805 A.2d 524 (Pa. 2002)("Since the instant notice of appeal was filed beyond the thirty-day time limit within which to file an appeal[,] . . . we must conclude that we lack jurisdiction to consider the appeal.").

17. As a result, plaintiffs' appeal must be quashed. Id. ("We order the appeal quashed. . . . Appellant has failed to comply with the law of appellate procedure and we cannot find that jurisdiction exists where it clearly does not.").

18. Plaintiffs may raise two arguments in opposition to this Motion to Quash, but both must be summarily rejected.

19. First, plaintiffs may point out that, on January 18, 2006, they filed a Motion for Reconsideration of the Order of December 30, 2005, which awarded summary judgment to the moving defendants. (See Exhibit "A," Docket Entries).

20. However, the law is well-settled that the filing of a Motion for Reconsideration after summary judgment is entered does not toll the appeal time. See In re Trust Under Deed of Green, 779 A.2d 1152, 1156 (Pa. Super. 2001), appeal denied, 805 A.2d 524 (Pa. 2002)("The filing of a petition for reconsideration of a final order granting summary judgment does not toll the thirty-day appeal period.").[2]

21. Secondly, plaintiffs may rely on the fact that, following the entry of summary judgment on December 30, 2005, a Praecipe for Entry of Judgment was filed on January 9, 2006. (See Exhibit "A," Docket Entries).

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[2] In the instant matter, the Motion for Reconsideration was denied by the trial court on February 6,2006, after the thirty day appeal period had already expired. (See Exhibit "A," Docket Entries).

22. Once again, however, the Order of December 30, 2005 had already granted summary judgment and "the order itself was final and appealable[.]" Feidler, 784 A.2d at 815 ("Since the order granting summary judgment disposed of the entire matter, the order itself was final and appealable.").

23. Since the summary judgment was itself a final judgment, the subsequent Praecipe for Entry of Judgment "was a meaningless act" that did not toll the appeal time. See Progressive Home Fed. Say. & Loan v. Kocak, 518 A.2d 808, 809 (Pa. Super. 1986) ("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered.").

24. In addressing a virtually identical issue nearly two years ago, this Court stated the following:

> **Since the order entered judgment on all claims and for all parties, it was immediately appealable and judgment did not need to be later entered by praecipe, although it was. . . . We advise the bar to be wary of a common pitfall[,] the appeal must be filed within thirty days of the Rule 236 notice of summary judgment, not a later-filed praecipe to enter judgment.**

Gartland v. Rosenthal, 850 A.2d 671, 671 n.1 (Pa. Super. 2004)(emphasis added).

25. Thus, contrary to plaintiffs' expected argument, the Order granting summary judgment, rather than the Praecipe for Entry of Judgment, triggered plaintiffs' appeal time.

26. Since Rule 236 Notice was issued on the same date that the December 30th Order was issued, (See Exhibit "A," Docket Entries, p. 2), plaintiffs' appeal time commenced on that date and it expired

on January 29, 2006.

27. Since plaintiffs failed to timely appeal the grant of summary judgment, there can be no doubt that this Court lacks jurisdiction and the appeal must be quashed. See In re Trust Under Deed of Green, 779 A.2d at 1157; accord, Cresswell v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 181 (Pa. Super. 2003)("[I]t is clear Appellant's appeal from the grant of summary judgment in favor of Appellee PNMCI is untimely because it was filed more than 30 days after an immediately appealable final order. Therefore, this Court is divested of jurisdiction to entertain the appeal as to the grant of summary judgment in favor of Appellee PNMCI, and we must quash.")(citations omitted).

WHEREFORE, Defendants/Appellees, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones, respectfully move this Honorable Court to quash plaintiffs' appeal.

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Williamson, Friedberg & Jones

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Quash Plaintiffs' Appeal has been served upon counsel listed below via U.S. First Class Mail, postage prepaid, this date:

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Date: 2-23-06

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 302 MDA 2006

CANOE MANUFACTURING CO., INC.
and M. ROBERT ULLMAN,
Plaintiffs, Appellants

v.

JOSEPH H. JONES, ESQUIRE
and WILLIAMSON, FRIEDBERG & JONES,
Defendants, Appellees

ANSWER OF APPELLANTS/PLAINTIFFS CANOE MANUFACTURING CO., INC. and M. ROBERT ULLMAN TO DEFENDANTS/ APPELLEES' MOTION TO QUASH

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ANSWER OF PLAINTIFFS/APPELLANTS TO DEFENDANTS/APPELLEES' MOTION TO QUASH

1. The allegations contained in Paragraph I of Defendants/Appellees' Motion are conclusions of law, not averments of material fact. As such, these allegations are deemed denied without specific response. Strict proof, if material, is demanded.

2. Admitted only that Plaintiffs filed their appeal herein on February 7, 2006, taking their appeal from the Judgment entered herein against them on January 9, 2006. As to all other allegations in Paragraph 2, Plaintiffs/Appellants' respond that such allegations are conclusions of law, not averments of material fact. As such, these allegations are deemed denied without specific response. Strict proof, if material, is demanded.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Denied. To the contrary, the Order granting Summary Judgment may become final and appealable if it is entered in a declaratory judgment action, or if it is drafted in such a fashion as to constitute Entry of Judgment within the meaning of Pa. R.C.P. 227.4(2). There are several requirements in that must be satisfied if an Order granting Summary Judgment is to be deemed a final order and immediately appealable; among these is the requirement that such Summary Judgment Order not only dispose of all parties involved, it must also dispose of all claims. This case is not a declaratory judgment action as was Cresswell (820 A.2d 172), and

the other requirements necessary were not satisfied in this case (as set forth in greater detail below herein).

13. Admitted.

14. Denied as to January 29, 2006 and as to appeal from the Order of December 30, 2005. To the contrary, and pursuant to Pa. R.A.P. 341(b)(1), the Order which disposed of all claims as well as all parties was the Praecipe for Entry of Judgment filed on January 9, 2006 because the Order of December 30, 2005, granting Summary Judgment on two of the claims asserted[1], denying Summary Judgment on one of the claims asserted[2], and leaving open and un-ruled-upon two additional claims for Summary Judgment[3], failed to dispose of all claims as well as

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[1] The "agreement to agree" claim for summary judgment and the claim for summary judgment based on the final decree in bankruptcy for Canoe Manufacturing Co., Inc.

[2] The claim for summary judgment based upon the doctrine of "merger."

[3] The claims for summary judgment based upon "release" and "res judicata/collateral estoppel" arising out of an earlier federal court action. These tv claims for summary judgment were first asserted in Defendants' First Motion for Summary Judgment, which Motion was filed in October, 1999. When the Court ruled (on December 22, 2000) on that First Motion for Summary Judgment, it granted Summary Judgment on another issue, leaving these issues open to be renewed at a later time. It was not until after Paintiffs/Appellants amicably resolved their differences with other parties to the litigation that they were able t file a Praecipe for Judgment and appeal the ruling on the First Motion for Summary Judgment; at Plaintiffs/Appellants' behest, the Superior Court on February 16, 2004, reversed the trial court's grant of summary judgment and remanded the matter for trial. Thereafter, after Defendants/Appellants unsuccessfully petitioned the Supreme Court of Pennsylvania for Allowance of Appeal, the matter was returned to the trial court. However, Defendants/Appellants — after more than 12 years — again renewed their quest Summary Judgment. Once again, they got a decision in their favor from this trial court, and once again the trial court left open certain claims for summary judgment, thereby assuring Defendants/Appellees yet another crack at the summary judgment remedy in the event that Plaintiffs/Appellants succeed (and live long enough) on this appeal.

all parties. Since the Order of December 30, 2005 left open certain claims for Summary Judgment, Plaintiffs/Appellants first sought reconsideration (seeking at least to convince the trial court to rule on all claims for summary judgment). That Motion was denied, and, Judgment having been expressly entered by Praecipe[4], thereby closing out all open claims, Plaintiffs/Appellants filed their Notice of Appeal within thirty (30) days thereof — on February 7, 2006. Hence, Plaintiffs/Appellants are appealing from the Judgment which extinguished all claims, that of January 9, 2006, and their appeal is timely.

15. Admitted.

16. Denied. To the contrary, the Order properly appealed from is the Judgment entered herein on January 9, 2006. Since the Notice of Appeal was filed on February 7, 2006, the appeal is timely, and the Court has jurisdiction pursuant to 42 Pa. C.S. §742.

17. Denied. To the contrary, the appeal herein is timely because the Order properly appealed from is the Judgment of January 9, 2006, as set forth in greater detail in Paragraphs 14 and 16 hereof.

18. The averments in Paragraph 18 of the Motion to Quash are speculation and/or conclusions of law, not averments of material fact. As such, Plaintiffs/Appellants are not required to plead thereto, and such averments are deemed denied without specific response.

19. Plaintiffs/Appellants incorporate herein by reference the averments set forth in greater detail in Paragraph 18 hereof.

20. Plaintiffs/Appellants incorporate herein by reference the averments set forth in greater detail in Paragraph 18 hereof.

---

[4] On January 9, 2006.

21. Plaintiffs/Appellants incorporate herein by reference the averments set forth in greater detail in Paragraph 18 hereof.

22. Plaintiffs/Appellants incorporate herein by reference the averments set forth in greater detail in Paragraph 18 hereof.

23. Admitted only that the quotation is correctly cited. Otherwise denied. To the contrary, the quotation is incomplete because the Order in that case granting Summary Judgment was different from the Order granting Defendants/Appellees' Second Motion for Summary Judgment here: there, the Court granted the Motion and directed the Prothonotary explicitly to enter Judgment on the Order. Here, the trial court granted — in part, denied in part (and left open certain parts of) — Defendants/Appellees' Second Motion for Summary Judgment, and the Order here (unlike the Order in Progressive Home Fed. Say. & Loan v. Kocak, supra) failed to direct the Prothonotary to enter Judgment. In Progressive, the Court ruled that it was because Judgment was explicitly entered by the specific statement in the Order granting the Summary Judgment Motion that the case did not fall within the Pa. R.C.P. 227.4(2) category of Orders where relief was granted but Judgment was not entered (which Orders get reduced to Judgment by the filing of a Praecipe for Judgment):

> "The trial court's order docketed on July 8, 1985 in this case stated: ". . . it is hereby ORDERED that the Plaintiffs Motion is granted and Summary Judgment is entered.... " This order was final and appealable, and appellant had to file an appeal, if at all, within 30 days of this order. Because the order stated that "judgment is entered" it was entirely unnecessary for appellee to praecipe for judgment, as it did on July 17, 1985. Once the trial court's order entering judgment was filed on July 8, 1985, judgment was entered. The

> subsequent praecipe for judgment was a meaningless act because the judgment had already been entered. See: Pa. R.C.P. 227.4(2) (the prothonotary shall enter judgment on praecipe of a party when the court itself does not enter judgment) (emphasis added)." Progressive Home Fed. Say. & Loan v. Kocak, 359 Pa. Super. 120, 518 A. 2d 808 (1986).

24. The language quoted is mere dictum in the Gartland case because the Notice of Appeal was filed timely with reference to the Order granting Summary Judgment which, in that case, specifically entered Judgment:

> "We corrected the caption to reflect that this is an appeal from a judgment rather than an order. The order dated April 24, 2003 entered summary judgment. Since the order entered judgment on all claims and for all parties, it was immediately appealable and judgment did not need to be later entered by praecipe, although it was." Gartland v. Rosenthal, Pa. Super. , 850 A. 2d 671 (2003), footnote 1. (Emphasis added.)

In this respect, the Order cited in Gartland appears to be akin to the Order in Progressive: an Order which not only grants the Summary Judgment Motion but also enters Judgment. Progressive distinguished that case from the case where the trial court grants the Motion for Summary Judgment but does not specifically enter Judgment. In the latter instance, per the Progressive Court, the Order is governed by Pa. R.C.P. 227.4(2), where relief is granted, but Judgment is not entered until the filing of the Praecipe for Entry of Judgment. 359 Pa. Super. 120, 518 A. 2d 808. The instant case is different in

that here, unlike the situation in Progressive, relief was granted but the Order doing so did not direct the Prothonotary to enter Judgment; this led to the subsequent filing of a Praecipe for Judgment, thereby satisfying the language quoted above from the decision in the Progressive Home Fed. Say. & Loan, supra case. Per these cases, the timing of the appeal herein is timely, and jurisdiction in this Court attaches.

25. Denied for the reasons set forth in greater detail in Paragraphs 18-24 hereof, which are incorporated herein by reference.

26. Denied for the reasons set forth in greater detail in Paragraphs 18-24 hereof, which are incorporated herein by reference.

27. Denied. To the contrary, Plaintiffs/Appellants' appeal herein is timely, and this Court's jurisdiction attaches. The Cresswell case, cited by Defendants/Appellees does not govern here because it is a declaratory judgment action, and because, under the Declaratory Judgment Act (42 Pa. C.S. §7532), Court declarations concerning the rights of the parties can have the "force and effect of a final judgment or decree," giving rise to the circumstance that Orders in declaratory judgment actions can be final orders when, in other actions, such Orders would be interlocutory in nature. Nationwide Mutual Ins. Co. v. Wickett, 563 Pa. 595, 763 A. 2d 813 (2002); Chalkey v. Roush, 569 Pa. 462, 805 A. 2d 491 (2002). Accordingly, those cases do not – in the circumstances of this case – contradict the Court's holding in Progressive Mutual Ins. Co., supra.

New Matter

28. This appeal and this Motion to Quash present the Court the opportunity to address those objectives of minimizing protracted litigation and avoiding piecemeal appeals which were the foundation of the amendments issued in the past

decade to Pennsylvania Rule of Appellate Procedure 341. McKinney v. Albright, 429 Pa. Super. 440, 632 A. 2d 937 (1993); Rivera v. Carbon County Tax Claim Bureau, Pa. Cmwlth. , 857 A. 2d 208 (2004).

29. This case is an old case (filed in 1993, concerning events occurring in1986), and this appeal to the Superior Court is the second such appeal herein. The case is a case which has not yet been permitted to proceed to trial, and it is also a case which has been the subject, in the Opinion of the Superior Court issued herein on February 16, 2004[5], of the unusual directive that the matter be assigned to a different Judge upon remand than the Judge who administered the case in proceedings leading up to the First Motion for Summary Judgment. Opinion of the Superior Court in Canoe Manufacturing Co., Inc., et al. v. Joseph Jones, Esq., et al., 693 MDA 2003, February 16, 2004. Accordingly, this case is a "poster child" for the protracted litigation, piecemeal appeal case, and Plaintiffs/Appellants urge the Court to address those issues herein.

30. This case had occasion to come before this Court in connection with Defendants/Appellees' Second Motion for Summary Judgment. The first Summary Judgment Motion, raising issues of the statute of limitations, alleged release and res judicata/collateral estoppel (due to a federal court case), was granted by the trial court on the sole ground of the statute of limitations on December 22, 2000. Plaintiffs/Appellants successfully appealed that ruling, and — after an unsuccessful Petition for Allowance of Appeal — the matter was remanded in late 1994 to the Court of Common Pleas for Schuylkill County, where it had originated.

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[5] In that opinion, the Superior Court reversed the ruling of the Court of Common Pleas granting summary judgment and remanded the case for trial.

31. Defendants/Appellees filed a Second Motion for Summary Judgment, and in it they asserted three new grounds for Summary Judgment: that allegedly a certain bank letter of March 31, 1986 was not a contractual "commitment letter" but an unenforceable "agreement to agree," as a result of which Plaintiffs' causes of action for attorney breach of fiduciary duty and/or professional malpractice should therefore be dismissed; the doctrine of merger; and the preclusion of Plaintiffs/Appellants' various causes of action (both as to Canoe Manufacturing Co., Inc. and as to those of its President, M. Robert Ullman) due to the final decree issued in the Canoe bankruptcy proceeding. Further, Defendants/ Appellees reasserted the open claims for summary judgment which had been raised in their First Motion for Summary Judgment, but which had not been ruled upon the first time around. Opinion of the Court of Common Pleas for Schuylkill County granting Defendants' Second Motion for Summary Judgment, dated December 30, 2005, p. 2.

32. However, in granting the Defendants/ Appellees' Second Motion for Summary Judgment, the Court neglected to rule upon the release and res judicata/collateral estoppel claims for summary judgment, leaving them open to be renewed again, if Plaintiffs/Appellants should succeed in this appeal. Opinion of the Court of Common Pleas for Schuylkill County granting Defendants' Second Motion for Summary Judgment, dated December 30, 2005, p. 2. Exhibit "A" hereto is a true and correct copy of the Opinion and Order of the Court of Common Pleas for Schuylkill County, dated December 30, 2005.

33. By Praecipe dated January 9, 2006, Judgment was entered against Plaintiffs and in favor of Defendants. A true and correct copy of this document is attached hereto, incorporated herein by reference and marked Exhibit "B."

34. Plaintiffs/Appellants moved for Reconsideration asking the Court reconsider its entire ruling; at the minimum, Plaintiffs/Appellants requested the Court to at least rule upon the still-open claims for summary judgment.

35. Reconsideration not having been granted, Plaintiffs/Appellants appealed from the Judgment entered on January 9, 2006, and they raised two issues in addition to their challenge to the Order granting the Second Motion for Summary Judgment: whether the Court violated Pa. R.C.P. 1035.2's prohibition against "unreasonably delaying" trial when the Court denied Plaintiffs/Appellants' Motion to Strike the Second Motion for Summary Judgment on the grounds that the case was already too old, and that Defendants suffered no prejudice because they could still present all of these defenses at trial.; and whether, in view of the Court's apparent desire to extend the Summary Judgment process to delay trial until the parties had suffered irreparable damage through the passage of time, Plaintiffs/ Appellants could receive a fair trial in Schuylkill County, given the prominence of the Defendants in that County.

36. Plaintiffs/Appellants filed their Notice of Appeal on February 7, 2006, within thirty (30) days from the date of the Judgment entered on January 9, 2006.

37. Plaintiffs appealed from the Judgment of January 9, 2006, and they found the Order of December 30, 2005 granting the Motion for Summary Judgment to be an Order granting relief, but which "does not itself enter judgment or order the Prothonotary to do so" (Rule 227.4(2) of the Pennsylvania Rules of Civil Procedure), for three reasons:

(a) The Order granted relief but did not explicitly enter Judgment or order the Prothonotary to do so, thereby coming within the explicit terms of

Pa. R.C.P. 227.4(2);

(b) The Order of December 30, 2005, because it left open and undecided two of Defendants' claims for summary judgment (release and res judicata/collateral estoppel), was not an Order which "disposes of all claims and of all parties," as per the language of Rule 341(b)(1) of the Pennsylvania Rules of Appellate Procedure; and

(c) Per the language of Johnson the Florist v. TEDCO Corp., the actual entry of judgment is itself a jurisdictional matter:

> "However, the law of this Commonwealth has long recognized that the entry of judgment is a jurisdictional matter. "The requirement that judgment be docketed is jurisdictional." Murphy v. Brong, 321 Pa. Super. 340, 343, 468 A.2d 509, 511 (1983); Hilliard v. Hilliard, 295 Pa. Super. 317, 319, 441 A.2d 1251, 1252 (1982); Unterberger v. Life Assurance Co. of Pennsylvania, 286 Pa. Super. 469, 470, 429 A.2d 34, 35 (1981); Gadbois v. Leb-Co Builders, Inc., 290 Pa. Super. 523, 525, 434 A.2d 1267, 1268 (1981); Coren v. DiDomenico, 291 Pa. Super. 331, 333, 435 A.2d 1252, 1253 (1981). Moreover, "the entry of judgment is a prerequisite to our exercise of jurisdiction." Davanzo v. Finelli, 293 Pa. Super. 70, 72, 437 A.2d 995, 996 (1981); Firestone Tire & Rubber Co. v. W.P. Cooke, Inc., 289 Pa. Super. 333, 334, 433 A.2d 93 (1981); Slaseman v. Myers, 285 Pa. Super. 167, 168, 427 A.2d 165, 166 (1981). See also 2 Goodrich-Amram 2d § 1038(b):1, at 501 (1976)." Johnson the Florist, Inc. v. TEDCO Corporation, 441 Pa. Super. 281, 657 A. 2d 511 (1995).

38. Certain specified types of cases have special characteristics which render holdings regarding treatment of summary judgment orders

unique to those types of cases and thus not of general application:

(a) Asbestos cases: in these cases, under the specific procedures applicable to asbestos cases, reverse bifurcation was often permitted, as well as the renewal of summary judgment motions without specific identification of the Motion as a Motion for Summary Judgment, and at a point in time where the case had sometimes years of future proceedings before it. See Tohan v. Owens-Corning Fiberglas Corp., Pa. Super. , 696 A. 2d 1 195 (1997). Since the procedural context established by those procedures is so different from that of the ordinary civil case, determinations of appealability in that context are not persuasive in the more general context.

(b) Declaratory Judgment cases: since, by statute, a Court's pronouncements in a declaratory judgment action concerning the rights of the parties are often held to constitute a final order, 42 Pa. C.S. §7532, final orders can appear at unusual times in declaratory judgment actions. Cresswell v. Penna. National Mutual Insurance Co., Pa. Super. , 820 A. 2d 172 (2003). Accordingly, those holdings relating to issues of appealability may not be of general application.

(c) Custody cases: because a finding of custody may entail both a declaration of custodial rights and a factual investigation concerning the interests of the child, an order declaring custodial rights is not final until the investigation concerning the child's interests is concluded, and it is not final unless the Court intends the order to be final. G.B.v. M.M.B., 448 Pa. Super. 133, 670 A. 2d 714 (1996). Hence, rules applicable to such cases are of limited applicability in the general context.

39. While the Court will often look to whether

or not the Order in question "puts the appellant out of court," that principle is invoked only when the order at issue does not fit within the specific definitions set forth in the applicable rules. 16 Standard Pennsylvania Practice 2d §86:15. Where, as here, the Order in question fits explicitly within the confines of Rules 227.4(2) of the Pennsylvania Rules of Civil Procedure and 341(b)(1) of the Pennsylvania Rules of Appellate Procedure, the rules control, and the Courts do not resort to the general principle. See 16 Standard Pennsylvania Practice 2d §86:15.

40. Central to determination of this issue is the need to address the abusive practice by the trial court of deciding these summary judgment motions piecemeal, and of leaving undecided one issue after another, so that the parties face an endless round of piecemeal appeals which delay bringing the matter to trial interminably. The parties have already suffered prejudice through the passage of time herein as a result of this practice

(a) The Defendants/Appellants' professional liability insurer has been adjudged insolvent and has gone into reorganization in the State of New Hampshire, thereby prejudicing the parties through the passage of time herein;

(b) The chief witnesses (Joseph Jones, Esq. and M. Robert Ullman) are at least 80 and 76 respectively, and Mr. Ullman has recently suffered a heart attack. The passage of time, excessive at this point, must necessarily dim the memories of witnesses and prejudice the parties as a matter of law.

(c) The case was filed in 1993, and, if the parties are entitled to a trial, it should occur within their reasonable life expectancy.

41. This case involves serious allegations of professional misfeasance and malpractice and breach of fiduciary duty, including the following:

(a) The failure of the attorneys to advise their corporate clients that the final loan documents the clients were to execute did not conform to the terms of the earlier "commitment letter" in at least two important respects: the clients would not receive promised and necessary new (or additional) financing at closing; and the clients would be voluntarily restructuring the company's loan portfolio and putting up additional collateral (including personal guarantees on the Ullman residence and the pledge of CDs by Mr. Ullman's mother-in-law) but they would not be getting in return the additional financing which was the bargained-for exchange;

(b) The lender (Meridian Bank and its subsidiary Meridian Commercial Credit Corp. ("MCCC")) determined not to extend new financing because of a need to resolve certain FDIC regulatory issues related to guarantees of MCCC loans, including MCCC's loan to Canoe Manufacturing Co., Inc.;

(c) The averments, by Plaintiffs/ Appellants, that Joseph Jones, Esq. was a member of Meridian Bank's Board of Directors while he was representing them in their attempt to borrow additional funds from a Meridian subsidiary; that, when Meridian Bank determined not to extend new financing to Canoe, Mr. Jones never advised Plaintiffs/Appellants that he was thereby placed in a position of irreconcilable conflict of interest; and that instead of protecting their clients' interests, the attorney Defendants/Appellants in conducting themselves as they did herein acted to prefer the commercially valuable interest of Meridian Bank (through Mr. Jones's position on its Board of Directors) to the interest of Canoe Manufacturing Co., Inc., a one-time client which was paying the attorneys' bills; and

(d) The attorney defendants' conduct in

withholding the "commitment letter" and all copies thereof from their clients until more than five (5) years had elapsed after the closing on the loan restructuring and the signing of the fatal documents, during which time Canoe Manufacturing Co., Inc. failed, and much of the additional collateral was foreclosed upon or lost. In light of these matters, Plaintiffs/Appellants urge the Court to consider the conduct of the Court, and whether it in effect aided and abetted the Defendant attorneys through the dilatory administration of these Motions for Summary Judgment, whereby the repeated renewal of these claims for summary judgment, years apart, was permitted by the Court's apparently considered approach of ruling on only some, but not all, of the summary judgment claims before it.

42. Such conduct by the Court encourages protracted litigation, and it encourages piecemeal appeals, thereby undermining the administration of justice and burdening the appellate courts. Accordingly, Plaintiffs/Appellants urge this Court to evaluate the Orders at issue herein within the context of the apparent decision to leave open one or more claims by Defendants for summary judgment whenever the Court below should determine to decide one of these repeated Motions for Summary Judgment.

43. Acknowledging that the issues raised in this Motion to Quash are jurisdictional issues, Plaintiffs/Appellants nevertheless urge the Court to so read the applicable rules as to render the one consistent with the other, thereby giving proper effect to both the requirements of Rule 227.4(2) of the Rules of Civil Procedure (relating to Orders granting relief but not specifically entering Judgment) and those of Rule 341(b)(1) of the Rules of Appellate Procedure (defining as final those orders which close out all of the claims raised on application for

summary judgment, as well as "disposing" of all parties[6]). Since quashing an appeal is a draconian, but procedural (i.e., not on the merits), remedy, the law favors appeals as it does likewise the reading of two applicable procedural rules in such as fashion as to be consistent the one with the other. See First Valley Bank v. Steinman, 353 Pa. Super. 8, 384 A. 2d 949 (1978).

44. Plaintiffs/Appellants urge that this Motion to Quash, together with their Answer thereto, be referred in the first instance to the Motions Panel for review.

WHEREFORE, Canoe Manufacturing Co., Inc. and M. Robert Ullman, Plaintiffs and Appellants herein urge this Honorable Court to deny this Motion to Quash.

LAW OFFICE OF JOHN P. McKELLIGOTT, Esq.

By:/S/

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[6] In 1997, the Supreme Court amended Pa. R.A.P. 341 to define a final order as one which "disposes of all claims and of all parties," changing the prior language of the rule. Previously, that Rule defined as final an order which "disposes of all claims or all parties." (Emphasis added.) Order of the Pennsylvania Supreme Court of July 7, 1997 amending various appellate rules, including Rule 341. If simply dismissing all parties from court was all that was required for a final order, without at least ruling upon all of the claims raised on summary judgment below, then there was no need for this amendment to the Rules of Appellate Procedure. Put another way, if this Court is to give effect to the change in language explicitly adopted by the Supreme Court in 1997, then this Court must recognize that an Order granting a Motion for Summary Judgment does not become final by alone dismissing all parties from the case while leaving undecided and open one or more claims raised below in the summary judgment proceedings.

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In the
Superior Court of Pennsylvania

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302 MDA 2006

CANOE MANUFACTURING COMPANY
and ROBERT ULLMAN,
Plaintiffs/Appellants

v.

JOSEPH H. JONES, ESQUIRE and
WILLIAMSON, FRIEDBERG & JONES,
Defendants/Appellees

REPLY OF DEFENDANTS/APPELLEES, JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES, TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO QUASH PLAINTIFFS' APPEAL

I. INTRODUCTION

Defendants/Appellees, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones hereinafter "defendants"), file this Reply to Plaintiffs' Answer to Defendants' Motion to Quash Plaintiffs' Appeal. Plaintiffs' 16-page Answer asserts clearly erroneous arguments, interjects a number of irrelevant matters, and presents an unnecessary and incorrect discussion of the history of this case. While the following Reply addresses plaintiffs' arguments to the extent necessary, nothing in the Answer should be permitted to obscure the straightforward issue of appellate jurisdiction presented by defendants' Motion to Quash, namely, whether plaintiffs filed a timely

appeal from the trial court's Order of December 30, 2005, which awarded summary judgment to defendants and disposed of all remaining claims and all remaining parties. Since the record establishes beyond doubt that plaintiffs did not appeal the December 30th Order until February 7, 2006, their appeal was clearly untimely and this Court lacks jurisdiction to proceed.

II. REPLY ARGUMENT

A. Plaintiffs' Argument That The Order Granting Summary Judgment Did Not Dispose Of All "Claims" Because It Did Not Address Each Basis On Which Defendants Sought Summary Judgment Is Clearly Wrong

In opposing the defendants' Motion to Quash, plaintiffs' primary argument is that the Order of December 30, 2005, was not a final, appealable Order because it did not dispose "of all claims and of all parties," as required to constitute an appealable Order under Pa.R.A.P. 341(b)(1). According to plaintiffs, since the Order granted summary judgment on only two of the bases urged by the defendants, and since it left "un-ruled-upon" two other bases urged by defendants, those remaining bases were "claims" that survived summary judgment. (Plaintiffs' Answer, p. 3, 114). Plaintiffs present this curious argument as follows:

> The Order of December 30, 2005, because it left open and undecided two of Defendants' claims for summary judgment (release and res judicata/collateral estoppel), was not an Order which "disposes of all claims and of all parties," as per the language of Rule 341(b)1) of the Pennsylvania Rules of Appellate Procedure.

(Plaintiffs' Answer, p. 10, ¶37(b); see also, p. 3, 114; stating that "the Order of December 30, 2005, granting summary judgment on one of the claims asserted, and leaving open and un-ruled-upon two additional claims for Summary Judgment, failed to dispose of all claims as well as all parties.")(footnotes omitted).

As these passages suggest, plaintiffs characterize the various bases on which defendants sought summary judgment as "claims" within the meaning of Rule 341. Since these "claims" were not addressed by the trial court, plaintiffs assert, the Order granting summary judgment did not dispose "of all claims and of all parties and it therefore could not have been a final and appealable Order under Rule 341. This assertion is clearly wrong because it confuses "claims" with arguments. By requesting summary judgment on different bases, defendants were not raising their own claims; they were challenging the legal sufficiency of plaintiffs' claims. A defendant does not raise "claims" by requesting summary judgment. Indeed, the rules of civil procedure recognize only three types of "claims" by defendants: counterclaims against plaintiffs (Pa.R.C.P. 1031); and cross-claims and third party claims against other defendants (Pa.R.C.P. 2252). Obviously, by requesting summary judgment, defendants were making none of the types of claims recognized by the rules. Plaintiffs do not cite, and defendants have not found, any legal authority whatsoever for the argument that defendants were asserting "claims" by requesting summary judgment on various bases.

Moreover, Rule 341's reference to "all claims" refers only to the types of claims recognized elsewhere in the rules. Indeed, the Rule itself specifically identifies the four types of claims that may be resolved by a trial court: "a claim, counterclaim, cross-claim, or third-party claim[.]"

Pa.R.C.P. 341(c)("When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the trial court or other government unit may enter a final order as to one or fewer than all of the claims[.]") (emphasis added). Therefore, when the Rule states that a final Order is any Order that "disposes of all claims and of all parties," the "claims" to which the Rule refers can only be claims, counterclaims, cross-claims, or third-party claims. This is the only way to read Rule 341 in a manner that is consistent with the other rules defining the permissible types of claims. Of course, this Court must construe procedural rules involving the same subject as a unified whole. See Pa.R.C.P. 131 (Rules in Para Materia)("Rules in para materia shall be construed together, if possible, as one rule or one chapter of rules."). Since the remaining rules recognize only four types of claims, this Court cannot construe Rule 341 in a manner that allows a fifth type of claim (i.e., a defendant's request for summary judgment). Since the Order of December 30, 2005, undeniably awarded summary judgment and dismissed all of plaintiffs claims, it was clearly final and appealable. See Feidler v. Morris Coupling Co., 784 A.2d 812, 815 (Pa. Super. 2001)("Since the order granting summary judgment disposed of the entire matter, the order itself was final and appealable.").

Putting aside the procedural rules and case law, plaintiffs defy logic by arguing that defendants were asserting "claims" when they requested summary judgment on various bases. If plaintiffs are correct, no trial court could enter a final Order dismissing plaintiffs case until it addressed each and every argument made by a defendant. If the court dismissed the case on one basis alone, without addressing others bases, the case would be stuck in a legal limbo: a plaintiff's claims would be dismissed but he or she

could not appeal until the trial court went back and addressed every alternative argument made by defendant. This Court cannot interpret Rule 341 to sanction such an absurd and unworkable result. See Pa.R.C.P. 128 (Presumptions in Ascertaining the Intent of the Supreme Court)("In ascertaining the intention of the Supreme Court in the promulgation of a rule, the courts may be guided by the following presumptions, among others: (1) That the Supreme Court does not intend a result that is absurd, impossible of execution or unreasonable[.]").

There is not, and has never been, a requirement that a trial court respond to each and every argument made by a party in support of its request for summary judgment or other relief. Instead, where a trial court grants summary judgment and dismisses plaintiffs case on one basis, without addressing additional bases, the Order is final and appealable. See Wishnefsky v. Riley & Fanelli, P.C., 799 A.2d 827, 829 n. 2 (Pa. Super. 2002) (considering plaintiffs appeal from the grant of summary judgment and noting, "Because of its finding on this issue, the trial court declined to address the remaining arguments advanced by Appellee for the entry of summary judgment."); and Naylor v. Township of Hellam, 773 A.2d 770, 777 (Pa. 2001)(noting that the trial court had granted summary judgment on one basis but declined to address defendant's remaining basis for summary judgment). If plaintiffs' view of the law is correct, the grants of summary judgment in these cases were not appealable, but they clearly were. So long as summary judgment is proper on one basis, neither a trial court nor an appellate court must address the remaining bases offered by a party. See e.g., Hoffman v. Sun Pipe Line Co., 575 A.2d 122 (Pa. Super. 1990)("At the trial level, the court granted appellee's motion [for summary judgment] on the ground that appellants were not foreseeable plaintiffs

without specifically ruling on the other issues. Because of our disposition of appellants' first claim, we need not address these alternative bases for granting the motion.").[1]

For all of these reasons, this Court should summarily reject plaintiffs' argument that the trial court's grant of summary judgment was not final under Rule 341 because it did not address each argument asserted by defendants.[2]

B. Contrary To Plaintiffs' Argument, An Order Granting Summary Judgment As To All Claims And All Parties Need Not Explicitly Recite The Entry Of Judgment In Order To Be Appealable

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[1] Of course, unlike their counterpart in this case, the plaintiffs in Wishnefsky and Naylor appealed within thirty days after the entry of summary judgment.

[2] Plaintiffs' argument that the award of summary judgment was not final under Rule 341 leaves them with a problem: if the Order was not final, why is their current appeal proper? Plaintiffs attempt to answer this question with the strained argument that, although the grant of summary judgment did not address the defendants' remaining bases for summary judgment, the praecipe for judgment somehow "disposed of" those bases. (See Plaintiffs' Answer, p. 3; "[T]he Order which disposed of all claims as well as all parties was the praecipe for Entry of Judgment[.]"). It is not clear how the praecipe for judgment "disposed of the defendants' remaining arguments, especially where the defendants themselves filed the praecipe. As this Court has held, the filing of a praecipe for judgment after the entry of summary judgment is "a meaningless act[.]" See Progressive Home Fed. Say. & Loan v. Kocak, 518 A.2d 808, 809 (Pa. Super. 1986)("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered."). As a result, plaintiffs are wrong in arguing that the praecipe validated their late appeal by somehow disposing of the defendants' remaining arguments.

Plaintiffs next argue that an Order disposing of all claims and all parties is not final and appealable unless it explicitly states that judgment is entered. (Plaintiffs' Answer, pp. 5-6,1123-24). Thus, plaintiffs maintain, the Order of December 30, 2005 was not appealable because it "failed to direct the Prothonotary to enter Judgment." (Plaintiffs' Answer, p. 5, 123). Plaintiffs cite no authority for their novel argument that an Order granting summary judgment is appealable only if it separately recites that judgment is entered.

As its name suggests, a summary judgment is a judgment and no separate entry of judgment is required. Indeed, as our Supreme Court has recognized, the rules of civil procedure require the "entry" of summary judgment where the movant is entitled to judgment as a matter of law. See e.g., Scalice v. Pa. Emples. Benefit Trust Fund, 883 A.2d 429 , 434-435 (Pa. 2005), citing Pa.R.C.P. 1035.2(l) ("We begin with the Pennsylvania Rules of Civil Procedure that govern summary judgment. The Rules instruct in relevant part that the court shall enter judgment whenever there is no genuine issue of any material fact[.]")(emphasis added). Since a summary judgment is itself a judgment, our courts consistently refer to the entry of summary judgment. See e.g., Mullin v. DOT, 870 A.2d 773, 776 (Pa. 2005) (remanding with instructions for the trial court to "enter summary judgment" for the defendant); Phillips v. Cricket Lighters, 841 A.2d 1000, 1004 (Pa. 2003)(addressing the trial court's "entry of summary judgment."); and Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1198 (Pa. Super. 1997), appeal denied, 718 A.2d 786 (Pa. 1998)("Post-trial motions are not allowed following the entry of summary judgment, as it is the entry of judgment which initiates the running of the appeal period.") (emphasis added). As these cases suggest, plaintiffs

are mistaken in arguing that the grant of summary judgment does not enter judgment unless is specifically "direct[s] the Prothonotary to enter Judgment." (Plaintiffs' Answer, p. 5, 123).

Since the grant of summary judgment clearly constitutes the entry of judgment, no separate judgment, or recitation that judgment is entered, is required. Instead, "the order itself" is immediately appealable. See Feidler v. Morris Coupling Co., 784 A.2d 812, 815 (Pa. Super. 2001)("Since the order granting summary judgment disposed of the entire matter, the order itself was final and appealable.") (emphasis added); see also, Gartland v. Rosenthal, 850 A.2d 671, 671 n.1 (Pa. Super. 2004)("Since the order entered [summary] judgment on all claims and for all parties, it was immediately appealable and judgment did not need to be later entered[.]"). While plaintiff posits that the Order in Gartland may have specifically recited the entry of judgment, there is no support for this speculation. Instead, the Superior Court's Opinion suggests that the entry of summary judgment itself "entered judgment." Id. ("The order dated April 24, 2003 entered summary judgment. Since the order entered judgment on all claims and for all parties, it was immediately appealable[.]"). Nowhere does the Superior Court suggest that the Order was only appealable because it also separately recited the entry of judgment.[3]

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[3] Plaintiffs also claim that the quoted discussion in Gartland was "mere dictum." (Plaintiffs' Answer, p. 6, 124). This is not true. Indeed, as the Superior Court made clear, it amended the caption of its prior Opinion to clarify that the appeal was taken from a judgment, not an Order. Gartland, 850 A.2d at 671 n.l. Since the quoted language was important enough for this Court to amend its prior Opinion and clarify the basis of the appellant's appeal, it was directly relevant to the Court's resolution of the case. The quoted language, which was unanimously endorsed by the three-judge panel, was not dicta. Black's Law Dictionary 454 (6th

Finally, plaintiffs attempt to distinguish Progressive Home Fed. Say. & Loan v. Kocak, 518 A.2d 808, 809 (Pa. Super. 1986)("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered."). According to plaintiffs, the Order in Progressive was different from the Order in this case because it "directed the Prothonotary explicitly to enter Judgment on the Order." (Plaintiffs' Answer, p. 5, 123). This is false. The Order in Progressive merely stated that "Summary Judgment is entered[.]" Id. at 808. Nowhere did the Order direct the Prothonotary to do anything. Such direction was unnecessary because, again, the grant of summary judgment itself constituted the entry of judgment. Since the Order itself entered judgment, "it was entirely unnecessary for appellee to praecipe for judgment[.]" Id. Progressive refutes, rather than supports, plaintiffs' claim that they could delay appealing until the praecipe to enter judgment was filed.[4]

For these reasons, this Court should reject plaintiffs' claim that an Order granting summary judgment as to all claims and all parties in not appealable unless the Order explicitly "direct[s] the

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ed. 1990)(defining "dicta" as "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases as legal precedent.").

[4] Plaintiffs' repeated references to Pa.R.C.P. 227.4(2), which provides that the Prothonotary shall enter judgment on praecipe of a party when the court itself does not enter judgment, is unavailing. Since the trial court entered judgment by awarding summary judgment as to all claims and all parties, Rule 227.4(2) is clearly inapplicable.

Prothonotary to enter Judgment." (Plaintiffs' Answer, p. 5, 123).

[C]. Plaintiffs' Attack On The Trial Judge And Interjection of Equitable Considerations Are Factually Erroneous and Legally Irrelevant To The Question of Appellate Jurisdiction Presented By Defendants' Motion to Quash

The "New Matter" in plaintiffs' Answer consists of a scandalous attack on the trial judge and an extremely self-serving and misleading discussion of plaintiffs' view of the "merits" of the case. According to plaintiffs, the trial judge "aided and abetted the Defendant attorneys through the dilatory administration of justice," engaged in an "apparently considered approach" to "undermin[e] the administration of justice," and conducted an "abusive practice" of deciding issues piecemeal. (Plaintiffs' Answer, pp. 13, 15, 19[40-42). Plaintiffs further argue that this Court should resolve defendants' Motion to Quash based upon "objectives of minimizing protracted litigation and avoiding piecemeal appeals[.]" (Id., p. 7, 128).

Given the narrow issue of appellate jurisdiction presented by their Motion, defendants will resist the urge to respond in detail to plaintiffs' attack on the esteemed trial judge and their improper attempt to interject their own self-serving view of this case.[5] Suffice it to say that, as the trial court has found, plaintiffs' view of this case has no basis in law or fact.

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[5] Defendants will respond to plaintiffs' claims if and when briefing on the merits is required. However, it must be noted that plaintiffs' complaints about "protracted litigation" are especially ironic because plaintiffs' own litigation tactics, including the filing of no less than three appeals, have consistently delayed the resolution of this case.

whether they timely appealed from the December 30th Order granting summary judgment and dismissing their case entirely. A timely appeal is a prerequisite to this Court's exercise of jurisdiction. See In re Trust Under Deed of Green, 779 A.2d 1152, 1157 (Pa. Super. 2001), appeal denied, 805 A.2d 524 (Pa. 2002)("Since the instant notice of appeal was filed beyond the thirty-day time limit within which to file an appeal[,] . . . we must conclude that we lack jurisdiction to consider the appeal.").

Since plaintiffs failed to timely appeal, this Court lacks jurisdiction and it cannot consider alleged equitable factors to create jurisdiction where none exists. Id. ("We order the appeal quashed. . . . Appellant has failed to comply with the law of appellate procedure and we cannot find that jurisdiction exists where it clearly does not."). In other words, unless plaintiffs' appeal was timely, this Court has no legal authority to consider the appeal. Consequently, even if the trial judge has engaged in improper conduct (which he certainly has not), and even if plaintiffs' complaints about "protracted litigation" and "piecemeal appeals" are accurate (which they certainly are not), this Court cannot consider them. Plaintiffs simply cannot be allowed to divert attention from their clear failure to file a timely appeal.

III. CONCLUSION

Based on the foregoing, Defendants/Appellees, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones, respectfully move this Honorable Court to quash plaintiffs' appeal.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Motion to Quash Plaintiffs' Appeal has been served upon counsel listed below via U.S. First Class Mail, postage prepaid, this date:

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Date: 3-21-06

CANOE MANUFACTURING CO., INC. et al.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH H. JONES, ESQUIRE, et al.	:	NO. 302 MDA 2006
	:	(C.P. SCHUYLKILL COUNTY S-759-93)

ORDER

The court hereby GRANTS the motion to quash.

PER CURIAM

Date: APR 12 2006

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 302 MDA 2006

CANOE MANUFACTURING COMPANY, INC. and M. ROBERT ULLMAN,
Appellants

vs.

JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES,
Appellees

APPELLANTS' APPLICATION FOR REARGUMENT BEFORE A COURT *EN BANC* OF ORDER IMPROVIDENTLY QUASHING APPEAL

Application for Reargument Before a Court *En Banc* of the Order Entered April 12, 2006 Quashing the Appeal from the Order of the Court of Common Pleas of Schuylkill County, Civil Division, Entered January 9, 2006 at No. S-759-1993

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ORDER AS TO WHICH REARGUMENT *EN BANC* IS SOUGHT

Appellants request reargument *en banc* of the Per Curiam Order of this Court dated April 12, 2006, summarily entered pursuant to Superior Court Internal Operating Procedure § 65.22, which provided: "The court hereby GRANTS the motion to quash." The Order has been characterized as "improvident" because its entry resulted from material factual misrepresentations made in Appellees' Motion to Quash.

SPECIFICATION OF POINTS OF LAW AND FACT MISAPPREHENDED BY THE PANEL OR MOTIONS JUDGE

A. INTRODUCTION

The appeal at No. 302 MDA 2006 was a **timely** appeal perfected on February 7, 2006 from a final Order entered January 9, 2006. That appeal was nevertheless summarily dismissed, without benefit of the certified original record, by Per Curiam Order dated April 12, 2006. The Order of dismissal was issued in apparent response to a Motion to Quash which made **multiple misrepresentations** as to the procedural posture of the appeal, the most serious of which was the assertion that the Order appealed from was "really" an Order dated December 30, 2005 as to which "**Rule 236 Notice was sent** the same day." Had that statement been correct, the dismissal of the appeal might have warranted. **The assertion that Rule 236 Notice of entry of judgment was sent to the parties on December 30, 2005 was, however, an outright lie.**

This Court, having been deceived by counsel for Appellees as to crucial facts dispositive of the issue of timeliness, should now vacate its April 12, 2006, reconsider the question of timeliness on the basis of the facts of record, and let the appeal proceed on the merits.

B. POINTS OF FACT MISAPPREHENDED BY THE PANEL OR MOTIONS JUDGE

The pivotal facts misapprehended by the Court were the direct result of three serious affirmative misrepresentations made by Appellees in paragraphs 2, 9 and 10 of their Motion to Quash, which was not even verified as required by Pa. R.A.P. 123(c). A true and correct copy of the Motion to Quash is attached hereto as Exhibit "A."

In paragraph 2 of their Motion, Appellees represented to this Court that the instant appeal was taken from an Order of the Court of Common Pleas of Schuylkill County dated December 30, 2005, when in fact the appeal was taken from the judgment entered on the docket in that court on January 9, 2006, as unambiguously reflected in the Notice of Appeal filed February 7, 2006, 29 days after judgment was entered and Rule 236 Notice sent.

In paragraph 9, Appellees represented to this Court that the Court of Common Pleas of Schuylkill County "entered judgment in favor of moving defendants and against plaintiffs" on December 30, 2005. This statement is demonstrably false. As support for their misrepresentation, Appellees reference the Order and Opinion of the Honorable Cyrus Palmer Dolbin dated December 30, 2005. Neither of those documents purports to enter or directs entry of judgment in favor of Appellees, however.

In paragraph 10, Appellees further misrepresent to the Court that "Rule 236 Notice was sent" on December 30, 2005. As purported support for their misrepresentation, Appellees referenced the Docket Entry which contains the notation "COPIES MAILED." No Rule 236 Notice was sent on December 30, 2005, nor was a notation made on the docket on that date that Rule 236 Notice was sent. Date-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties. That fact is entirely irrelevant to the purely technical issues of timeliness on which the Motion to Quash purported to be based. What is significant for present purposes is that **no Rule 236 Notice accompanied that mailing and no docket entry even suggests that one did.** A true and correct copy of Pages 1-2 of 10 of the docket entries is attached hereto as Exhibit "B."

In perpetrating their fraud on this Court, Appellees were aided by the fact that the original record was never transmitted to the Superior Court, a

fact confirmed by the Deputy Prothonotary's April 12, 2006 letter transmitting the Order quashing the appeal: "The original record was not filed in the Superior Court." A true and correct copy of the Court's letter and Order is attached hereto as Exhibit "C."

In order to establish the crucial fact that the only documents mailed to the parties on December 30, 2005 were time-stamped copies of the Opinion of Court and Order of Court issued by the Honorable Cyrus Palmer Dolbin, Appellants have obtained from the Prothonotary of Schuylkill County a certified copy of the documents referenced in the docket entry for December 30, 2005. That certified copy is attached hereto as Exhibit "D." The original record, had it been transmitted to this Court, would therefore have reflected that the only documents mailed by the Prothonotary on December 30, 2005 were Judge Dolbin's Opinion and Order – **no Rule 236 Notice was sent, nor was judgment entered on the docket on December 30, 2005.**

The text of the December 30, 2005 Order stated:

> AND NOW, this 30th day of December 2005, Defendants' Second Motion for Summary Judgment is granted. No genuine issue of fact exists, and Defendants are entitled to judgment as a matter of law.
>
> BY THE COURT:
>
> /S/ Dolbin, J.
> CYRUS PALMER DOLBIN,
> Judge

As anticipated by Rule 227.4(2) of the Pennsylvania Rules of Civil Procedure, which expressly provides for entry of judgment upon praecipe of a party, the December 30, 2005 Order "grants . . . relief but does not itself enter judgment or order the prothonotary to do so." Given the wording of the Order, coupled with the absence of entry of

judgment or a Rule 236 Notice, a praecipe was clearly necessary to effectuate the entry of judgment on the Order, a circumstance Appellees recognized and acted upon by filing just such a praecipe on January 9, 2006. Indeed, it was in direct response to that Praecipe that the Prothonotary, **on January 9, 2006**, entered judgment on the December 30, 2005 Order and sent a Notice pursuant to Pa. R. Civ. P. 236. This was the first and only Rule 236 Notice ever sent in connection with the award of summary judgment. That January 9, 2006 Rule 236 Notice, which was entirely ignored by Appellees in their Motion to Quash, as was the docket entry dated January 9, 2006 expressly entering judgment on the docket. In fact, Appellees disingenuously attempted to explain away their own filing of the Praecipe as a "meaningless act." *See* Motion to Quash (Exhibit "A" hereto) ¶ 23. While the Rule 236 Notice was attached as Exhibit "B" to Appellants' Answer to the Motion to Quash, its significance was obscured by Appellees' misrepresentation that a separate Rule 236 Notice had been sent on December 30, 2005. A certified copy of the Praecipe to Enter Judgment and the Rule 236 Notice filed and mailed January 9, 2006 is attached hereto as Exhibit "E."

C. POINTS OF LAW MISAPPREHENDED BY THE PANEL OR MOTIONS JUDGE

In granting Appellees' Motion to Quash, the Panel or Motions Judge misapprehended the interplay between Rule 236 (and 227.4(2)) of the Rules of Civil Procedure and Rules 108(b), 301(a) and 903(a) of the Rules of Appellate Procedure and reached a result directly contrary to the decision of the Pennsylvania Supreme Court in *Frazier v. City of Philadelphia*, 557 Pa. 618, 621, 735 A.2d 113, 115 (1999), previously followed by this Court in *Vertical Resources, Inc. v. Bramlett*, 837 A.2d 1193 (Pa. Super. 2003), and *Reeves v. Middletown Athletic Association*, 866 A.2d

1115 (Pa. Super. 2004).

Pa. R. Civ. P. 236, entitled "Notice by Prothonotary of Entry of Order or Judgment," provides in pertinent part:

> (a) The prothonotary shall immediately give **written notice** of the entry of
>
> . . . .
>
> (2) any other order or judgment to each party's attorney of record or, if unrepresented, to each party. **The notice shall include a copy of the order or judgment**.

(Emphasis supplied.) As the emphasized language makes clear, Rules 236 requires a separate written notice -- the order or judgment alone does not constitute "Rule 236 Notice." Indeed, prior to it amendment in 1994, Rule 236 "required notice of an order but not the mailing of a copy of the order itself[.]" Pa. R. Civ. P. 236, 1994 Explanatory Comment. The Rule now requires both.

The issue before the Court should have been controlled by the decision of the Supreme Court of Pennsylvania in *Frazier v. City of Philadelphia*, which clarified once and for all the method for determining timeliness of an appeal:

> Rule of Appellate Procedure 301(a) provides that "[n]o order of a court shall be appealable until it has been entered upon the appropriate docket in the lower court." *See generally Sidkoff, Pincus, et al. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 521 Pa. 462, 468, 555 A.2d 1284, 1287 (1989). Further, Rule of Appellate Procedure 108(b) designates the date of entry of an order, for purposes of appeal, as follows:
>
> > (b) Civil orders. **The date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation**

> **in the docket that notice of entry of the order has been given as required by Pa. R. Civ. P. 236(b).**

Pa. R.A.P. 108(b). As previously noted, Rule of Civil Procedure 236(b) describes the prothonotary's obligation to "note in the docket the giving of the notice and, when a judgment by confession is entered, the mailing of the required notice and documents."

Thus, pursuant to the express terms of the rules, an order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given. *See Yeaple v. Yeaple*, 485 Pa. 399, 403, 402 A.2d 1022, 1024 (1979); *see also Speight v. Burens*, 371 Pa.Super. 478, 481 n. 3, 538 A.2d 542, 543 n. 3 (1988). *Cf. Hepler v. Urban*, 518 Pa. 482, 484-85, 544 A.2d 922, 923 (1988)(finding that, where there is no indication in the docket that notice has been provided in accordance with Rule 236, an order granting summary judgment was not final). **That the parties may have received notice of the order does not alter the formal date of its entry and the associated commencement of the period allowed for appeal for purposes of the rules.** The procedural requirements reflected in the rules serve to promote clarity, certainty and ease of determination, so that an appellate court will immediately know whether an appeal was perfected in a timely manner, thus eliminating the need for a case-by-case factual determination. *See generally Commonwealth v. Dorman*, 272 Pa.Super. 149, 153-54, 414 A.2d 713, 716 (1979).

Frazier v. City of Philadelphia, 557 Pa. at 621, 735 A.2d at 115 (emphasis supplied).

In *Frazier*, although the appellant received actual notice by mail of an adverse judgment entered on the

docket on April 8, 1997, a unanimous Supreme Court held that the 30-day appeal period under Pa. R.A.P. 903(a) was not triggered until a notation was entered on the docket pursuant to Pa. R. Civ. P. 236(b) **some six months later** that notice of that judgment had been given to the parties, and that an appeal taken on November 10 , 1997, within 30 days of that belated notation was therefore timely.

Counsel for appellees' failure to disclose the fact that *Frazier* represented controlling authority directly adverse to Appellees' position come perilously close to violating Rule 3.3(a)(2) of the Rules of Professional Conduct. Only the "doctoring" of the facts of this case created even the semblance of a basis for distinguishing that authority.

It is also ironic that irregularities in compliance with Rule 236 by the Prothonotary of the Court of Common Pleas of Schuylkill County, the very court from which this appeal was taken, have **twice** been the subject of scrutiny by the Supreme Court, first in *Hepler v. Urban*, 518 Pa. 482, 544 A.2d 922 (1988), a decision cited by the *Frazier* Court, and again in *Hepler v. Urban* ("*Hepler II*"), 530 Pa. 375, 609 A.2d 152 (1992), in which the Supreme Court expressly held that the requirement under Pa. R.A.P. 108(b) that "the date of the entry of an order . . . shall be the day on which the clerk makes the **notation in the docket** that notice of entry of the judgment has been given as required by Pa. R. Civ. P. 236(b)" is both literal and mandatory. *Hepler v. Urban*, 530 Pa. at 380, 609 A.2d at 154 (emphasis supplied).

As evidenced by the Rule 236 notice issued in the instant case on January 9, 2006 as well as the corresponding docket entry "JUDGMENT ENTERED-NOTICES SENT" the Prothonotary of Schuylkill County now scrupulously complies with Rule 236, having abandoned the practice of writing "N.S." ("Notice Sent") on the backer of the Order entered, which the Supreme Court disapproved in *Hepler II*.

The prior docket notation "OPINION AND

ORDER OF COURT-COPIES MAILED" is entirely inconsistent with the dictates of Rule 236 or even the Schuylkill Prothonotary's former practice under that Rule. It cannot be deemed Rule 236 Notice.

Appellees' assertion in paragraph 24 of their Motion to Quash that this case is on all fours with *Gartland v. Rosenthal*, 850 A.2d 671 (Pa. Super. 2004), may be the only assertion in that Motion that is **correct**. *Gartland* entirely supports Appellants' position, however. The appeal in this case, like the appeal in *Gartland*, was filed within 30 days of the entry on the docket of Rule 236 notice of judgment, and is, like the appeal in *Gartland*, therefore timely. The *Gartland* Court's cautionary statement that "the appeal must be filed **within thirty days of the Rule 236 notice of summary judgment**[,]" *Gartland v. Rosenthal*, 850 A.2d at 672 n.1, should have been dispositive of Appellees' improper Motion to Quash.

STATEMENT OF REASONS FOR ALLOWANCE OF REARGUMENT BEFORE A COURT *EN BANC*

The Note to Pa. R.A.P. 2543, "Considerations Governing Allowance of Reargument," list three factors which, as applied to the instant case, warrant reargument:

> (1) Where the decision is by a panel of the court and it appears that the decision may be inconsistent with a decision of a different panel of the same court on the same subject.
> (2) Where the court has overlooked or misapprehended a fact of record material to the outcome of the case [and]
> (3) Where the court has overlooked or misapprehended (as by misquotation of text or misstatement of result) a controlling or directly relevant authority.

Accord, Superior Court I.O.P. § 65.38.B.1-3. The decision of the Panel or Motion Judge in this case is not only contrary to the decisions of the Supreme Court and prior panels of this Court; based on material misrepresentations of fact; and based on a misapplication of the applicable Rules of Procedure; but also rewards attorney misconduct and works a grave injustice on Appellants. As a prudential matter, the full Court may wish to consider the Motion to Quash filed in this case in order to address and prevent in the future the danger of the careless and arbitrary quashing of timely appeals on the basis of representations of counsel without benefit of a certified record from the court from which the appeal has been taken, and without exercise of the level of scrutiny appropriate to a decision that forever deprives a litigant of his or her right to appellate review.

The Court *en banc* may also wish to address the question of imposing sanctions on parties and their

counsel who file unscrupulous, bad faith motions to quash on the basis of misrepresentations and/or omissions of material fact bearing on the Court's jurisdiction. The waste of judicial resources as well as the cost to the affected litigants caused by such gamesmanship is unacceptable.

Given the clearly improvident nature of the Court's April 12, 2006 Order – as well as the glaring nature of the misrepresentations which prompted entry of that Order – this Court should, at a minimum, vacate its Order of dismissal and reinstate this appeal to the docket.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Order dated April 12, 2006 be vacated. Appellants further respectfully request that Appellees' Motion to Quash be denied with prejudice or, in the alternative, listed for briefing and reargument before a Court *en banc*.

Respectfully submitted,

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Attorneys for Appellants Canoe Manufacturing Co., Inc., and M. Robert Ullman

DATED: April 26, 2006

PROOF OF SERVICE

I, Joseph R. Viola, Esquire, hereby certify that I am this day serving two copies each of the foregoing Application for Reargument Before a Court *En Banc* upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class mail, postage prepaid, addressed as follows:

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Counsel for Appellees Joseph H. Jones, Equire, and Williamson, Friedberg & Jones

/S/
JOSEPH R. VIOLA, ESQUIRE

DATED: April 26, 2006

In the
Superior Court of Pennsylvania

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302 MDA 2006

CANOE MANUFACTURING COMPANY
and ROBERT ULLMAN,
Plaintiffs/Appellants
v.

JOSEPH H. JONES, ESQUIRE and
WILLIAMSON, FRIEDBERG & JONES,
Defendants/Appellees

ANSWER OF DEFENDANTS/APPELLEES, JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES, IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR EN BANC REARGUMENT

I. INTRODUCTION

By Order dated April 12, 2006, this Court properly quashed plaintiffs' appeal because it was not timely filed following the entry of a final summary judgment. Plaintiffs have now hired a new attorney who seeks en banc reargument by making an entirely new claim and hurling stunning allegations that defense counsel lied to, and perpetrated a fraud on, this Court. As discussed below, despite plaintiffs irresponsible allegations, defense counsel accurately portrayed every fact in this case. Properly viewed, plaintiffs' baseless claims of "attorney misconduct" are nothing more than a desperate attempt to obscure their own failure to timely appeal.

Equally important, while plaintiffs accuse defense counsel of "gamesmanship," it is plaintiffs who now

make an argument that is directly contrary to the basis on which they oppose the defendants' Motion to Quash. Specifically, beneath the redundant and accusatory nature of plaintiffs' Application for Reargument lies a single argument: the Schuylkill County Prothonotary never mailed Rule 236 notice of the December 30, 2005, Order and Opinion granting summary judgment. However, in responding to defendants' Motion to Quash, plaintiffs specifically admitted that Rule 236 Notice was in fact sent. (See Answer to Motion to Quash, ¶10; admitting defendants' averment that the Order granting summary judgment "was docketed on December 30, 2005 and Rule 236 Notice was sent the same day."). The docket also clearly confirms that Rule 236 notice was sent. As a result, this Court should summarily reject the new Rule 236 argument and baseless allegations of fraud devised by plaintiffs' new attorney.

II. ARGUMENT

This Court Properly Quashed Plaintiffs' Appeal Because They Clearly Failed To Timely Appeal From The Entry Of Summary Judgment on December 30, 2005

Putting aside plaintiffs' allegations of fraud, they make one central argument: they never received Rule 236 notice of the Order of December 30, 2005, which awarded summary judgment to defendants. As a preliminary matter, plaintiffs have never previously raised this argument. Instead, in response to the Motion to Quash, plaintiffs argued that they were not required to appeal the Order granting summary judgment because it did not dispose of all claims (which it clearly did) and because it did not specifically recite the entry of judgment (which it was not required to do). (See Plaintiffs' Answer to Defendants' Motion to Quash). Thus, plaintiffs never

claimed that Rule 236 notice was somehow inadequate. As its name suggests, reargument is not a venue for new arguments, and plaintiffs' sudden challenge to the sufficiency of Rule 236 notice should be deemed waived.[1]

Indeed, not only did plaintiffs fail to challenge the sufficiency of Rule 236 notice but, in their verified Answer to the Motion to Quash, they specifically admitted receiving Rule 236 notice of the December 30`h Order. (See Answer, ¶10; admitting defendants' averment that the Order granting summary judgment "was docketed on December 30, 2005 and Rule 236 Notice was sent the same day."). Of course, representations in motions and briefs are judicial admissions that are binding on the party who made them. See e.g., Bartholomew v. State Ethics Comm'n, 795 A.2d 1073, 1078 (Pa. Cmwlth. 2002)("A party's statements in its brief . . . are treated as a judicial admission. As McCormick indicates, judicial admissions are conclusive. A party may not offer evidence to contradict the judicially admitted facts.")(citation omitted). As a result, plaintiffs cannot now contradict their prior judicial admission that Rule 236 notice was in fact sent. Given this admission that they received Rule 236 notice, it is especially outrageous and offensive for plaintiffs to assert that defense counsel told "an outright lie" when he represented that plaintiffs' received such notice. (See Application for Reargument, p. 2; "The assertion that Rule 236 Notice of entry of judgment was sent to the

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[1] While this Court's discretion is broad, reargument is generally permitted only where the Panel rendered a decision that is inconsistent with the decision of another Panel, overlooked or misapprehended a material fact, overlooked or misapprehended a controlling legal authority, or relied on a case that has been overruled, reversed or modified. See generally, Pa.R.C.P. 2543 (Considerations Governing Allowance of Reargument). Obviously, assertion of an entirely new argument does not satisfy one of these usual bases for granting reargument.

parties on December 30, 2005 was, however, an outright lie.") (emphasis omitted).

Putting aside plaintiffs' tardy attempt to renounce their verified admission, the claim that Rule 236 notice was somehow deficient is clearly false. In fact, plaintiffs' argument is difficult to understand. Plaintiffs admit that the Prothonotary mailed to them time-stamped copies of the December 30th Order and Opinion on that date. (See Application for Reargument, p. 3; "Date-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties."). Nonetheless, plaintiffs argue that some additional written notice (perhaps a cover letter) also should have accompanied the Order and Opinion. Stated otherwise, plaintiffs argue that, although they received written copies of the Order and Opinion, they did not receive written notice of the Order and Opinion. Providing a written copy of an Order is providing written notice of the Order. It is simply ridiculous for plaintiffs to deny that they received notice of an Order from the Prothonotary while admitting that they received a copy of the Order from the Prothonotary.

Plaintiffs are wrong in repeatedly arguing that Rule 236 requires "a separate written notice." The Rule states only that "[t]he Prothonotary shall immediately give written notice" and "[t]he notice shall include a copy of the order or judgment." Pa.R.C.P. 236(a)(2). The Note to the Rule emphasizes that it "does not prescribe a particular method of giving notice." Note, Pa.R.C.P. 236. Contrary to plaintiffs' suggestion, the Rule does not require some specific type of notice in addition to the Order; it simply requires "written notice" of the Order. Once again, providing a written copy of the Order is obviously providing written notice of the Order.[2]

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[2] The 1994 Explanatory Comment to Rule 236 explains that the prior version of the Rule required the Prothonotary to send written notice, but not an actual copy, of an Order. The 1994

There is no precedent for plaintiffs' claim that the Prothonotary must accompany the Order with a cover letter stating that the Order has been entered. By receiving the written Order, a party has obtained written notice of the Order pursuant to Rule 236. The Rule 236 notice in this case was sufficient in all respects and plaintiffs' new argument to the contrary must be rejected.

Plaintiffs further argue that the docket does not reflect the entry of Rule 236 notice. Once again, this is clearly false. The Prothonotary sent the December 30`h Order and Opinion to the parties on that date and marked "COPIES MAILED" on the docket. Contrary to plaintiffs' claim, that notation clearly indicates Rule 236 notice because it signifies that the Prothonotary mailed the Order and Opinion to the parties. There is no support for plaintiffs' repeated argument (in bold lettering) that a separate Rule 236 notice must actually accompany the mailing. (Application for Reargument, p. 3; "What is significant for present purposes is that no Rule 236 Notice accompanied that mailing[.]"). Instead, Rule 236's requirement of written notice is satisfied by the very act of mailing an Order to the parties and no separate notice is required.

Plaintiffs' reliance on Pa.R.C.P. 227.4(2) is entirely misplaced. Like the remainder of Rule 227, Rule 227.4(2) contemplates post-trial motions after a verdict and authorizes a party to enter judgment via praecipe. Here, of course, a summary judgment was entered prior to trial. Since a summary judgment is

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amendment changed this practice and required the Prothonotary to send a copy of the Order. While plaintiffs suggest that the Prothonotary must now send both written notice and the Order, this is not true. Instead, it is only logical that a written copy of the Order is written notice of the Order. Accepting plaintiffs' argument would fundamentally change the manner in which Prothonotaries across Pennsylvania operate by requiring an additional, totally redundant notice that an Order has been entered.

itself a judgment, as its name suggests, the filing of a separate praecipe to enter judgment would have been "a meaningless act." See Progressive Home Fed. Say. & Loan v. Kocak, 518 A.2d 808, 809 (Pa. Super. 1986)("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered."). Plaintiffs' focus on a Rule authorizing the filing of a praecipe is confused and mistaken.

Plaintiffs' reliance on Frazier v. City of Philadelphia, 735 A.2d 113, 115 (Pa. 1999), is difficult to follow. That case merely held that an Order is not appealable until it is both entered on the docket and the docket reflects that notice of the Order has been sent. Id at 115 ("[A]n order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given."). Here, plaintiffs do not dispute that the December 30th Order and Opinion were docketed and the docketed undeniably reflects that copies were mailed to the parties. As discussed above, the notation "COPIES MAILED" establishes Rule 236 notice and there is no support for plaintiffs' claim that the docket entry must actually refer to Rule 236. Instead, the Rule requires only that the docket indicates "the giving of the notice[.]" Pa.R.C.P. 236(b). Once again, plaintiffs' allegation that defense counsel came "perilously close" to violating ethical rules by not citing Frazier, when that case hardly assists plaintiffs, is specious.

Finally, plaintiffs argue that the notation "Judgment Entered — Notices Sent" in a docket would "scrupulously compl[y]" with Rule 236, but the notation "Opinion and Order of Court — Copies Mailed" is somehow "entirely inconsistent" with the Rule. (Application for Reargument, p. 8). In support of this argument, plaintiffs cite Hepler v. Urban ("Hepler I"), 544 A.2d 922 (Pa. 1988), and Hepler v. Urban ("Hepler II"), 609 A.2d 152 (Pa. 1992), but

neither case assists plaintiffs. In Hepler I, the docket contained no notation whatsoever that notice of the subject Order had been sent. Id. at 923 ("The docket does not indicate that a copy of the court order was mailed to appellant or to her attorneys."). In Hepler II, the record showed that "N.S." (supposedly meaning "Notice Sent") had been marked on the blueback attached to the trial court's copy of the subject Order, but, again, there was no notation in the docket reflecting notice. The Supreme Court held that "a notation on a blueback is not a notation in the docket that notice of entry of the order has been given." Hepler II, 609 A.2d at 154 (emphasis in original). Nothing in either of the Helper opinions suggests that entering the notation "Opinion and Order of Court — Copies Mailed" in a docket, as the Prothonotary did in this case, is insufficient to show that notice of an Order was sent and received, especially where plaintiffs have acknowledged that "[d]ate-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties." (Appellants' Application for Reargument, p. 3).

While plaintiffs focus primarily on the sufficiency of Rule 236 notice, they also assert that defense counsel "misrepresented" other "facts." First, plaintiffs claim that defense counsel misrepresented that plaintiffs' appeal was taken from the December 30th Order granting summary judgment, when in fact it was taken from the praecipe to enter judgment on January 9, 2006. In support of this argument, plaintiffs point to language in their Notice of Appeal purporting to appeal from the January 9th praecipe. Plaintiffs seem to be suggesting that the mere wording of their Notice of Appeal can create an appealable Order when none exists. This suggestion is erroneous.

As this Court found in quashing plaintiffs' appeal, a praecipe to enter judgment following the grant of summary judgment is "a meaningless act" because the entry of summary judgment itself is the

appealable event. See Progressive Home Fed. Sav. & Loan, 518 A.2d at 809 ("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered.").[3] Therefore, regardless of what self-serving language plaintiffs included in their Notice of Appeal, the fact remains that the one and only appealable event in this case was the entry of summary judgment. Since the praecipe to enter judgment was a nonappealable "meaningless act," plaintiffs could not have appealed from that praecipe. Rather, whether they realized it or not, plaintiffs' appeal in this case was taken from the entry of summary judgment on December 30, 2005. Since the appeal was untimely, it was properly quashed. It was hardly a misrepresentation for defense counsel to state that plaintiffs appeal was taken (albeit late) from the December 30th Order entering summary judgment.[4]

Finally, plaintiffs also assail defense counsel's representation that the Order of December 30, 2005 "entered judgment in favor of moving defendants and against plaintiffs[.]" (See Application for Reargument, p. 3, citing Motion to Quash, ¶9). While plaintiffs claim that "t[h]is statement is demonstrably false," (Id.), it is undeniably true. Plaintiffs simply refuse to recognize that, as its name suggests, a summary

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[3] While defendants did file the praecipe to enter judgment, as plaintiffs emphasize, the praecipe was filed merely in an abundance of caution and was mere surplusage. As this Court's holding in Progressive makes clear, the praecipe did not toll plaintiffs' appeal time.

[4] Pa.R.A.P. 903 provides that "the notice of appeal . . .shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a)(emphasis added). Here, plaintiffs were required to appeal from the December 30th Order granting summary judgment and their focus on the subsequent, meaningless praecipe to enter judgment is mistaken.

judgment is a judgment. See Progressive Home Fed. Sav. & Loan, 518 A.2d at 809 ("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered.")(emphasis added). Therefore, the December 30th Order did in fact enter judgment and plaintiffs were required to appeal within 30 days. See Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1200 (Pa. Super. 1997).[5] It was totally unnecessary for a separate judgment to be entered following the entry of summary judgment. Progressive Home Fed. Sav. & Loan, 518 A.2d at 809. Once again, it was hardly a misrepresentation for defense counsel to maintain that the December 30th Order granting summary judgment entered judgment for the defendants. See Progressive Home Fed. Say. & Loan, 518 A.2d at 809.[6]

III. CONCLUSION

The relevant procedural history of this case is not disputed. On December 30, 2005, the trial court awarded summary judgment to the defendants with respect to all remaining claims and all remaining parties. The Order was entered on the docket with the notation "COPIES MAILED" and copies were in fact sent by the Prothonotary and received by all counsel. On January 29, 2006, the 30-day appeal

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[5] In addition to the fact that the December30th Order granted summary judgment, it specifically recited that defendants were "entitled to judgment as a matter of law." (Order December 30, 2005). This statement again belies plaintiffs' claim that the Order did not enter judgment for defendants.

[6] Despite settled law to the contrary, plaintiffs continue to argue that, although the December 30th Order entered summary judgment, "a praecipe was clearly necessary to effectuate the entry of judgment on the Order." (Application for Reargument, p. 5). Given his professed concern for the ethical rules, it is remarkable that plaintiffs new counsel continues to make an argument that is so contrary to settled law. See Progressive Home Fed. Sav. & Loan, 518 A.2d at 809.

period set forth in Pa.R.A.P. 903(a) expired. Plaintiffs' appeal was filed on February 7, 2006, nine days late. As a result, this Court had no choice but to quash plaintiffs' appeal.[7]

Based on the foregoing, Defendants/Appellees, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones, respectfully move this Court to reject plaintiffs' baseless allegations of misconduct and deny the Application for Reargument.

MARSHALL, DENNEHEY,
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BY:

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Attorneys for
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[7] Plaintiffs' argument that the original record was not before this Court is irrelevant. All of the relevant procedural history is apparent from the docket entries, which were attached to plaintiffs' own notice of appeal. See also, Pa.R.A.P. 904(b)(requiring that docket entries must be attached to a notice of appeal). Since the dockets specifically indicate that notice of the December 30`h Order was sent to all counsel, and since plaintiffs have admitted this fact, their attempt to create an issue regarding the original record is unavailing.

Joseph H. Jones, Esq., and
Williamson, Friedberg & Jones

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer in Opposition to Application for Reargument has been served upon counsel listed below via U.S. First Class Mail, postage prepaid, this date:

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Williamson, Friedberg & Jones

Date: 5-4-06

Canoe Manufacturing Co., Inc, et al.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	(C.P. Schuylkill County No. S-759-93)
	:	No. 302 MDA 2006
Joseph H. Jones, Esquire, et al.	:	Filed: May 5, 2006

ORDER

The application of appellants for reconsideration of this Court's oder of April 12, 2006, filed as an "Application for Reargument Before en Court En Banc," is hereby **DENIED.**

Per Curiam

IN THE SUPREME COURT OF PENNSYLVANIA

No. MAL 2006

CANOE MANUFACTURING COMPANY, INC. and M. ROBERT ULLMAN,
Petitioners

vs.

JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES,
Respondents

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from Order of the Superior Court Entered April 12, 2006 (Reargument Denied May 5, 20006) Quashing Appeal from Order of Court of Common Pleas of Schuylkill County, Civil Division, Entered January 9, 2006 at No. S-759-1993

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2. WHETHER THE BARE REPRESENTATION BY COUNSEL IN A MOTION TO QUASH THAT "RULE 236 NOTICE WAS SENT"ON A PARTICULAR DATE -- WHERE THERE IS NO CORRESPONDING NOTATION ON THE DOCKET THAT SUCH ACTION WAS TAKEN, AND WHERE NO RULE 236 NOTICE WAS, IN FACT, SENT ON THAT DATE -- A PROPER BASIS FOR THE SUPERIOR COURT PROTHONOTARY'S OFFICE TO COMPUTE THE JURISDICTIONAL 30-DAY APPEAL PERIOD FROM THE DATE SELECTED BY COUNSEL AND TO QUASH THE APPEAL?

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REFERENCE TO REPORTS OF OPINIONS BELOW

No opinion has been issued in connection with this matter, reported or unreported.

TEXT OF ORDER IN QUESTION

Petitioners seek review of the Per Curiam Order of the Superior Court dated April 12, 2006, summarily entered by the Deputy Prothonotary pursuant to Superior Court Internal Operating Procedure § 65.22, which provided: "The court hereby GRANTS the motion to quash."

The Superior Court Deputy Prothonotary denied Petitioners' Application For Reargument Before a Court En Banc by Per Curiam Order dated May 5, 2006, stating "The application of appellants for reconsideration of this Court's order of April 12, 2006, filed as an 'Application or Reargument Before a Court En Banc,' is hereby DENIED."

QUESTIONS PRESENTED FOR REVIEW

1. Whether an appeal to the Superior Court in a civil case filed on February 7, 2006, within 29 days of January 9, 2006, the date Rule 236 Notice of entry of the Order appealed from was first recorded on the docket, must be deemed timely under Pa. R.A.P. 108(b) and this Court's decisions in *Frazier v. City of Philadelphia*, 557 Pa. 618, 735 A.2d 113 (1999), *Hepler v. Urban,* 518 Pa. 482, 544 A.2d 922 (1988), and *Yeaple v. Yeaple*, 485 Pa. 399, 402 A.2d 1022 (1979)? ***Answered in the negative by the Superior Court.***

2. Whether the bare representation by counsel in a motion to quash that "Rule 236 Notice was sent"on a particular date -- where there is no corresponding notation on the docket that such action was taken, and where no Rule 236 Notice was, in fact, sent on that date -- a proper basis for the Superior Court Prothonotary's Office to compute the jurisdictional 30-day appeal period from the date selected by counsel and to quash the appeal? ***Answered in the affirmative by the Superior Court.***

3. Whether the *per se* rule embraced by the Superior Court in this case making any order that grants a motion for summary judgment automatically appealable on the date it is filed -- regardless of compliance with Pa. R. Civ. P. 236 and regardless of the operation of Pa. R.A.P. 108(b) -- is consistent with the requirements of those Rules and this Court's decisions regarding the prerequisites to the appealability of an order granting summary judgment? ***Answered in the affirmative by the Superior Court.***

CONCISE STATEMENT OF CASE

A. INTRODUCTION

The quashed Superior Court appeal at No. 302 MDA 2006 which is the subject of the instant Petition was a **timely** appeal perfected on February 7, 2006 from an Order granting summary judgment on which judgment was entered and Notice under Rule 236 was noted on the docket on January 9, 2006. That appeal was nevertheless summarily dismissed by the Deputy Prothonotary of the Superior Court on April 12, 2006, in response to a Motion to Quash which falsely asserted that the Order appealed from was "really" an **Order dated December 30, 2005** as to which "**Rule 236 Notice was sent the same day.**" Although the docket entries flatly contradict that assertion, Petitioners have been stripped of their appellate rights and denied their "day in court" after 12 years of litigation as a consequence of a "blunder" that was never committed.

B. FACTUAL BACKGROUND

The underlying action sounding in breach of fiduciary duty and legal malpractice was brought by Canoe Manufacturing Co., Inc. ("Canoe"), a manufacturer of children's jeans for K-Mart, Sears, Montgomery Ward and other large customers, and once the second-largest employer in Schuylkill County, and M. Robert Ullman, Canoe's President and CEO ("Ullman"), against Canoe's former attorney, Joseph H. Jones, Esquire ("Jones"), and Jones's law firm, Williamson, Friedberg & Jones. Jones was not only a prominent Pottsville attorney with an active commercial practice, but was also a Director of Meridian Bank and the Chair of Meridian Bank's Directors' Audit Committee.

Jones represented Canoe in its effort to secure new financing from Meridian Commercial Credit

Corp. ("Meridian") to help Canoe, then Meridian's largest and most profitable customer, weather severe cash flow problems in 1985 and 1986. In the course of Jones's negotiations to obtain new financing for Canoe, Meridian demanded additional collateral; a "commitment letter," pursuant to which Meridian agreed to furnish new financing in return for additional collateral, was subsequently approved by Meridian's Loan Committee and issued on March 31, 1986. After being signed by the President of Meridian and countersigned by Ullman on Canoe's behalf, the "commitment letter" was entrusted to Jones and consigned to his files.

In the course of drawing up loan documentation to secure additional collateral, language was inserted which had the effect of securing additional collateral for Meridian from Canoe **but removing Meridian's obligation to extend additional financing**. Although Jones initially opposed the inclusion of such a provision on the ground that it was prejudicial to Canoe and inconsistent with the "commitment letter," that language was included in the final documents. Accordingly, Canoe **did** furnish the additional collateral but **did not** receive additional financing. As a result, Canoe failed.

Canoe initially filed for Chapter 11 bankruptcy protection in 1987; two years later, however, upon petition of Meridian, the proceedings were converted to a Chapter 7 liquidation.

On May 13, 1991, during a deposition of Jones in another case, Canoe and Ullman discovered the existence of the March 31, 1986 "commitment letter" which had languished in Jones's files for five years. As a result of that discovery, this case was commenced on May 5, 1993 by Canoe and Ullman against Jones, Williamson, Friedberg & Jones and Meridian in the Court of Common Pleas of Schuylkill County.

The case proceeded to a period of extensive discovery during which Canoe and Ullman produced

five to ten cartons of documents, Jones and his firm produced all discoverable portions of their files relative to Canoe, and Meridian produced more than 20 file cabinets of documents. Over all, more than 40 depositions were taken. In 1999, the Court entered an Order setting a discovery deadline of September 30, 1999.

On November 3, 1999, Jones and his firm moved for summary judgment, asserting numerous grounds. On December 22, 2000, the Honorable J. Michael Stine granted summary judgment only on the basis of the statute of limitations. Because this ruling left open the Counterclaims another party, Meridian, against of Canoe and Ullman, the Order was not then appealable as of right.[1] Once Canoe and Ullman were able to resolve their differences with Meridian, however, Canoe and Ullman filed a praecipe for entry of judgment and appealed the summary judgment award to the Superior Court on April 30, 2003 (No. 693 MDA 2003).

On February 16, 2004, the Superior Court reversed the decision of the Court of Common Pleas granting summary judgment to Jones and his firm and expressly remanded this case to Schuylkill County for trial, suggesting that the matter be reassigned to a different Judge. The Superior Court panel (Klein, Bender and Olszewski, JJ.) determined in a memorandum decision that there were genuine issues of material fact as to timing of Canoe and Ullman's knowledge and appreciation of the significance of the March 31, 1986 "commitment letter" which precluded summary judgment on the applicability of the "discovery rule" to the statute of limitations issue.

Jones and his firm then filed a Petitioned for Allowance of Appeal (No. 338 MAL 2004) in this

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[1] An appeal to the Superior Court (No. 570 MDA 2001) filed by Canoe and Ullman from a February 16, 2001 Order denying reconsideration was quashed for that reason.

Court, which was denied on October 5, 2004. The case was finally remanded to the Court of Common Pleas for Schuylkill County, where it was assigned to the Honorable C. Palmer Dolbin in place of Judge Stine.

On May 16, 2005, Jones and his firm filed a **Second Motion for Summary Judgment raising three entirely new issues**: (1) that Canoe and Ullman had no claim because the March 31, 1986 "commitment letter" was only an unenforceable "agreement to agree"; (2) that the March 31, 1986 "commitment letter" is merged into the subsequent loan restructuring final agreements of April 18, 1986, and thus had no legal significance; and (3) that Canoe and Ullman's right to proceed with this action was extinguished by the final decree issued in Canoe's bankruptcy proceeding.[2]

A motion to strike the Second Motion for Summary Judgment filed by Canoe and Ullman was immediately denied. After extensive briefing and submission of exhibits, the matter was argued in July of 2005. On December 30, 2005, Judge Dolbin granted the Second Motion for Summary Judgment on two of the three new grounds, namely, the "agreement to agree" theory and bankruptcy defense. The text of the December 30, 2005 Order stated:

> AND NOW, this 30th day of December 2005, Defendants' Second Motion for Summary Judgment is granted. No genuine issue of fact exists, and Defendants are entitled to judgment as a matter of law.
>
> BY THE COURT:
>
> /S/ Dolbin, J.

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[2] The initial summary judgment motion had raised issues not reached by Judge Stine; those outstanding issues were acknowledged and again raised in the second summary judgment proceeding, but they were not addressed by the lower court in the second summary judgment proceeding.

CYRUS PALMER DOLBIN,
Judge

The docket for December 30, 2005 reflects that Judge Dolbin had copies of his Opinion and Order date-stamped and mailed to the parties. No Rule 236 Notice was sent nor was a notation made on the docket that Rule 236 Notice was sent. Neither was judgment entered on the docket on December 30, 2005.

Counsel for Jones and his firm filed a praecipe for entry of judgment on Judge Dolbin's Order on January 9, 2006. In response to that praecipe, the Prothonotary, on January 9, 2006, entered judgment on the December 30, 2005 Order and sent a Notice pursuant to Pa. R. Civ. P. 236 to counsel.

On January 18, 2006, Canoe and Ullman moved for Reconsideration asserting that the Court's ruling on "agreement to agree" constituted mistake of law, that it wrongly applied the case law of Pennsylvania and wrongfully invaded the jury's province, and that it incorrectly analyzed this matter on the basis of contract law when the causes of action asserted herein were tort causes of action for professional negligence/legal malpractice and breach of fiduciary duty. Further, Plaintiffs/Canoe asserted mistake of law in that the Court misinterpreted the Bankruptcy Decree and mistook causes of action "abandoned" in the bankruptcy proceeding. Equally, Plaintiffs/Canoe asserted mistake of law in that the Canoe Bankruptcy Decree cannot dispose of Mr. Ullman's causes of action herein since he was not a party to the Canoe bankruptcy proceeding.

On February 6, 2006, Judge Dolbin denied the Motion for Reconsideration. On February 7, 2006, 29 days after Rule 236 Notice was noted on the docket, Canoe and Ullman filed their Notice of Appeal in the Court of Common Pleas for Schuylkill County.

On February 24, 2006, Counsel for Jones and his firm filed an unverified Motion to Quash Appeal

which asserted that the Order appealed from was "really" Judge Dolbin's Order of December 30, 2005. Jones's lawyers represented to the Superior Court that Judge Dolbin's December 30, 2005 Order **"entered judgment in favor of moving defendants and against plaintiffs."** Jones's lawyers also represented to the Superior Court that **"Rule 236 Notice was sent the same day**[,]" i.e., December 30, 2005. Both of those representations are belied by the docket entries and the record.

In paragraph 2 of the Motion to Quash, Jones's lawyers represented to the Superior Court that the appeal had been taken from an Order of the Court of Common Pleas of Schuylkill County dated December 30, 2005, when in fact the appeal was taken from the judgment entered on the docket in that court on January 9, 2006, as unambiguously reflected in the Notice of Appeal filed February 7, 2006, 29 days after judgment was entered and Rule 236 Notice sent. In paragraph 9, Jones's lawyers represented to the Superior Court that the Court of Common Pleas of Schuylkill County "entered judgment in favor of moving defendants and against plaintiffs" on December 30, 2005. Neither the Opinion of the Honorable Cyrus Palmer Dolbin dated December 30, 2005 nor the accompanying Order purported to enter or directs entry of judgment in favor of Jones and his firm.

Most glaring among the misrepresentations made in the unverified Motion to Quash, however, is paragraph 10, in which Jones's lawyers assert that "Rule 236 Notice was sent" on December 30, 2005. No Rule 236 Notice was sent on December 30, 2005, nor was a notation made on the docket on that date that Rule 236 Notice was sent. Date-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties, as the docket indicates. That fact is entirely irrelevant to the purely technical issues of timeliness on which the Motion to Quash purported to be based. What is significant is that **no Rule 236**

Notice accompanied that mailing and no docket entry even suggests that one did.

Canoe and Ullman filed an Answer to the Motion to Quash on March 13, 2006, to which Jones and his firm filed a Reply on March 23, 2006. On April 12, 2006 the Superior Court Deputy Prothonotary entered a Per Curiam Order quashing the appeal.

On April 26, 2006, Canoe and Ullman filed an Application for Reargument Before a Court En Banc of Order Improvidently Quashing Appeal. The Superior Court Deputy Prothonotary, deeming the filing to be an "Application for Reconsideration," denied the Application by Per Curiam Order on May 5, 2006, before Jones's Answer was received.

This Petition is being filed within 30 days of the May 5, 2006 Order pursuant to Pa. R.A.P. 1113(a)("the time for filing a petition for allowance of appeal . . . shall run from the entry of the order denying reargument . . . .").

CONCISE STATEMENT OF REASONS FOR ALLOWANCE OF APPEAL

The aberrant decision of the Superior Court in this case on the fundamental question of the proper manner in which to compute the time period for taking an appeal in a civil case is directly contrary to the decisions of this Court, as well as the decisions of prior panels of the Superior Court following this Court's binding precedent. For that reason, the Superior Court's defiant ruling must also be deemed an egregious departure "from the accepted and usual course of judicial proceedings" which warrants the exercise by this Court of its supervisory powers. *See* Pa. R.A.P. 1114, Note; Supreme Court I.O.P. §5.A.1-2, 5.

This Court has granted allocatur on numerous previous occasions where an intermediate appellate court has erroneously quashed a timely appeal, including cases involving the precise issue raised in the instant Petition. *See, e.g., In re Trust Under Deed of Green*, 572 Pa. 408, 816 A.2d 224 (2003)(granting allocatur and reversing Superior Court order quashing appeal as untimely, citing *Frazier v. City of Philadelphia); Schiller v. Royal Maccabees Life Insurance Co.*, 561 Pa. 148, 748 A.2d 1234 (2000)(same); *Frazier v. City of Philadelphia*, 557 Pa. 618, 621, 735 A.2d 113, 115 (1999)(ordering reinstatement of appeal quashed by Superior Court as untimely where there was no docket entry reflecting that Rule 236 notice was sent); *Hepler v. Urban,* 518 Pa. 482, 544 A.2d 922 (1988)(same); *Yeaple v. Yeaple*, 485 Pa. 399, 402 A.2d 1022 (1979)(same); *see also Dolan v. Pentex Energy, Inc.*, 577 Pa. 472, 846 A.2d 105 (2004)(granting allocatur, reversing order quashing appeal and remanding for further proceedings); *Zurn v. Zurn*, 539 Pa. 200, 651 A.2d 529 (1995) (granting allocatur, reversing order quashing appeal and remanding for consideration on the merits); *In re Appeal of Sheetz*, 539 Pa. 107, 650

A.2d 443 (1994)(same); *Jim Thorpe Area School District v. Carroll County Tax Claim Bureau*, 528 Pa. 595, 599 A.2d 972 (1991)(same); *Commonwealth v. Fleming*, 509 Pa. 626, 506 A.2d 898 (1986)(same); *see generally Motorists Mutual Insurance Co. v. Pinkerton*, 574 Pa. 333, 830 A.2d 958 (2003) (reversing Superior Court order quashing appeal and remanding for consideration on the merits); *Wynnewood Development, Inc. v. Bank and Trust Company of Old York Road*, 551 Pa. 552, 711 A.2d 1003 (1998)(same); *Lewis v. United Hospitals, Inc.*, 547 Pa. 626, 692 A.2d 1033 (1997)(same).

In granting Respondents' Motion to Quash, the Superior Court reached a result directly contrary to the decisions of this Court in *Frazier v. City of Philadelphia*, *Hepler v. Urban* and *Yeaple v. Yeaple*, previously followed by the Superior Court in *Gavula v. ARA Services, Inc.*, 756 A.2d 17 (Pa. Super. 2000), *Cardwell v. Chrysler Financial Corp.*, 804 A.2d 18 (Pa. Super. 2002), *Vertical Resources, Inc. v. Bramlett*, 837 A.2d 1193 (Pa. Super. 2003), and *Reeves v. Middletown Athletic Association*, 866 A.2d 1115 (Pa. Super. 2004), and completely disregarded the interplay between Rule 236 and 227.4(2) of the Rules of Civil Procedure and Rules 108(b), 301(a) and 903(a) of the Rules of Appellate Procedure.

Pa. R. Civ. P. 236, entitled "Notice by Prothonotary of Entry of Order or Judgment," provides in pertinent part:

> (a) The prothonotary shall immediately give **written notice** of the entry of
>
> . . . .
>
> (2) any other order or judgment to each party's attorney of record or, if unrepresented, to each party. **The notice shall include a copy of the order or judgment.**

(Emphasis supplied.) As the emphasized language makes clear, Rules 236 requires a **separate written notice** -- the order or judgment alone does not

constitute "Rule 236 Notice." Indeed, prior to it amendment in 1994, Rule 236 "required notice of an order but not the mailing of a copy of the order itself[.]" Pa. R. Civ. P. 236, 1994 Explanatory Comment. The Rule now requires both.

The issue raised in the instant Petition is controlled by this Court's decision in *Frazier v. City of Philadelphia*, which clarified once and for all the method for determining timeliness of an appeal:

> Rule of Appellate Procedure 301(a) provides that "[n]o order of a court shall be appealable until it has been entered upon the appropriate docket in the lower court." *See generally Sidkoff, Pincus, et al. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 521 Pa. 462, 468, 555 A.2d 1284, 1287 (1989). Further, Rule of Appellate Procedure 108(b) designates the date of entry of an order, for purposes of appeal, as follows:
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> > (b) Civil orders. **The date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given as required by Pa. R. Civ. P. 236(b).**
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> Pa. R.A.P. 108(b). As previously noted, Rule of Civil Procedure 236(b) describes the prothonotary's obligation to "note in the docket the giving of the notice and, when a judgment by confession is entered, the mailing of the required notice and documents."
>
> Thus, pursuant to the express terms of the rules, an order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given. *See Yeaple v. Yeaple*, 485 Pa. 399, 403, 402 A.2d 1022, 1024 (1979); *see also Speight v. Burens*, 371 Pa.Super. 478, 481 n. 3, 538 A.2d

> 542, 543 n. 3 (1988). *Cf. Hepler v. Urban*, 518 Pa. 482, 484-85, 544 A.2d 922, 923 (1988)(finding that, where there is no indication in the docket that notice has been provided in accordance with Rule 236, an order granting summary judgment was not final). **That the parties may have received notice of the order does not alter the formal date of its entry and the associated commencement of the period allowed for appeal for purposes of the rules.** The procedural requirements reflected in the rules serve to promote clarity, certainty and ease of determination, so that an appellate court will immediately know whether an appeal was perfected in a timely manner, thus eliminating the need for a case-by-case factual determination. *See generally Commonwealth v. Dorman*, 272 Pa.Super. 149, 153-54, 414 A.2d 713, 716 (1979).

Frazier v. City of Philadelphia, 557 Pa. at 621, 735 A.2d at 115 (emphasis supplied).

In *Frazier*, although the appellant received actual notice by mail of an adverse judgment entered on the docket on April 8, 1997, this Court unanimously held that the 30-day appeal period under Pa. R.A.P. 903(a) was not triggered until a notation was entered on the docket pursuant to Pa. R. Civ. P. 236(b) **some six months later** that notice of that judgment had been given to the parties, and that an appeal taken on November 10 , 1997, within 30 days of that belated notation was therefore timely.

Respondents relied heavily on the Superior Court's opinion in *In re Trust Under Deed of Green*, 779 A.2d 1152 (Pa. Super. 2001)[3], in which, according

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[3] In that case the Superior Court acknowledged that the prothonotary failed to make the appropriate docket entry giving notice to the parties pursuant to Rule 236 but deemed that

to Respondents, this Court **denied** allocatur ("appeal denied, 805 A.2d 524 (Pa. 2002)")[4] citing t hat decision as controlling authority three times in their Motion to Quash and once in their Reply to Petitioners' Answer. In reality, this Court not only **granted** allocatur in *In re Trust Deed of Green* but summarily **reversed**, citing *Frazier v. City of Philadelphia*, controlling authority Respondents chose to ignore. *In re Trust Under Deed of Green*, 572 Pa. 408, 816 A.2d 224 (2003).

It is also ironic that irregularities in compliance with Rule 236 by the Prothonotary of the Court of Common Pleas of Schuylkill County, the very court from which this appeal was taken, have **twice** been the subject of scrutiny by this Court, first in *Hepler v. Urban*, 518 Pa. 482, 544 A.2d 922 (1988), a decision cited by the *Frazier* Court, and again in *Hepler v. Urban* ("*Hepler II*"), 530 Pa. 375, 609 A.2d 152 (1992), in which this Court expressly held that the requirement under Pa. R.A.P. 108(b) that "the date of the entry of an order . . . shall be the day on which the clerk makes the **notation in the docket** that notice of entry of the judgment has been given as required by Pa. R. Civ. P. 236(b)" is both literal and mandatory. *Hepler v. Urban*, 530 Pa. at 380, 609 A.2d at 154 (emphasis supplied).

Judge Dolbin's December 30, 2005 Order on its face "grants . . . relief but does not itself enter judgment or order the prothonotary to do so." *See* Pa. R. Civ. P. 227.4(2). Indeed, the docket for December 30, 2005 reflects only that Judge Dolbin had copies of his Opinion and Order date-stamped and mailed to

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jurisdictional defect waived. *In re Trust Under Deed of Green*, 779 A.2d 1152, 1157 n.5 (Pa. Super. 2001), *reversed and remanded*, 572 Pa. 408, 816 A.2d 224 (2003).

[4] Respondents erroneously cite to this Court's denial of allocatur in *Green v. Green*, 783 A.2d 788 (Pa. Super. 2001), *allocatur denied*, 569 Pa. 707, 805 A.2d 824 (2002)(Nos. 1051-1053 MAL 2001).

the parties. **No Rule 236 Notice was sent nor was a notation made on the docket that Rule 236 Notice was sent. Neither was judgment entered on the docket on December 30, 2005.**

Pa. R. Civ. P. 227.4(2) expressly provides for entry of judgment upon praecipe of a party where an Order "grants . . . relief but does not itself enter judgment or order the prothonotary to do so." Given the wording of Judge Dolbin's Order, coupled with the absence of entry of judgment or a Rule 236 Notice, a praecipe was clearly necessary to effectuate the entry of judgment on the Order. Counsel for Jones and his firm recognized the necessity of this additional procedural step and filed a praecipe for entry of judgment on January 9, 2006. **Indeed, it was in direct response to that praecipe that the Prothonotary, on January 9, 2006, entered judgment on the December 30, 2005 Order and sent a Notice pursuant to Pa. R. Civ. P. 236.[5] This was the first and only Rule 236 Notice ever sent in connection with the award of summary judgment.**

As evidenced by the January 9, 2006 docket entry "JUDGMENT ENTERED-NOTICES SENT," the Prothonotary of Schuylkill County now scrupulously complies with the dictates of Rule 236. In that context, it is clear that the prior docket notation "OPINION AND ORDER OF COURT-COPIES MAILED" was not, nor was it intended to be, Rule 236 Notice.

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[5] A Rule 236 Notice of Filing Judgment was issued to Canoe Manufacturing Company on January 9, 2006. No such Notice was ever sent to M. Robert Ullman.

CONCLUSION

The decision of the Superior Court in this case is contrary to the decisions of this Supreme Court as well as the Rules promulgated by this Court to govern appellate procedure. Given the clearly erroneous nature of the Superior Court's April 12, 2006 Order – as well as the glaring nature of the factual and legal misrepresentations which prompted entry of that Order – this Court should vacate the Superior Court's Order of dismissal and remand the case to that Court with directions to reinstate this appeal to its docket for a decision on the merits.

In the alternative, Petitioner respectfully requests that this Court grant this Petition for Allowance of Appeal, enter this case on the Appeal Docket, and list the case for briefing and argument.

Respectfully submitted,
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DATED: June 2, 2006

PROOF OF SERVICE

I, Joseph R. Viola, Esquire, hereby certify that I am this day serving two copies each of the foregoing Petition for Allowance of Appeal upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:
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/S/_____
JOSEPH R. VIOLA, ESQUIRE

DATED: June 2, 2006

In the
Supreme Court of Pennsylvania

---

415 MAL 2006

CANOE MANUFACTURING COMPANY
and ROBERT ULLMAN,
Plaintiffs/Petitioners

v,

JOSEPH H. JONES, ESQUIRE and
WILLIAMSON, FRIEDBERG & JONES,
Defendants/Respondents

BRIEF OF DEFENDANTS/RESPONDENTS, JOSEPH H. JONES, ESQUIRE and WILLIAMSON, FRIEDBERG & JONES, IN OPPOSITION TO ALLOWANCE OF APPEAL

Appeal from the Order Of The Superior Court of Pennsylvania dated May 5, 2006, which Refused to Grant Reargument of the Order of April 12, 2006 at No. 302 MDA 2006, which Quashed the Appeal from the Summary Judgment Entered on December 30, 2005 in the Court Of Common Pleas Of Schuylkill County at No. S-759-1993

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INTRODUCTION

The defendants, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones (hereinafter "the law firm defendants"), respectfully ask this Honorable Court to deny the Petition for Allowance of Appeal filed by plaintiffs Canoe Manufacturing Co., and Robert Ullman (hereinafter "plaintiffs"). In order to secure allowance of appeal in this Court, a petitioner must demonstrate the existence of "special and important reasons therefor." Pa.R.A.P. 1114. This Court's Internal Operating Procedures explain that an appeal will be allowed only when a case involves a conflict in decisions on the same legal issue, an important issue of first impression, the constitutionality of a state statute, or a decision by an intermediate appellate court that "has so far departed from accepted judicial practices or so abused its discretion" that this Court must exercise its supervisory authority. See Supreme Court IOP V(A)(1-5).

This case clearly does not involve "special and important" issues or any other basis for allowance of appeal. Instead, it involves a simple question of appellate jurisdiction: whether plaintiffs filed a timely appeal from the trial court's Order of December 30, 2005, which awarded summary judgment to defendants and disposed of all remaining claims and all remaining parties. Since the docket establishes beyond doubt that plaintiffs did not appeal until February 7, 2006, their appeal was clearly untimely and the Superior Court properly quashed it. Therefore, while this case has a complicated procedural history, plaintiffs' appeal was properly quashed by the Superior Court on the simple basis that it was untimely.[1]

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[1] Plaintiffs' Statement of the Case presents a highly self-serving and inaccurate version of the "merits" of this case. However, the sole issue resolved by the Superior Court, and the sole issue

After the Superior Court quashed their appeal, plaintiffs hired a new attorney who sought reargument by making an entirely new claim and hurling stunning allegations that the law firm defendants' counsel lied to, and perpetrated a fraud on, the Superior Court. Plaintiffs have employed a similar tactic in this Court. As discussed below, despite plaintiffs' irresponsible allegations, the law firm defendants' counsel accurately portrayed every fact in this case. Properly viewed, plaintiffs' baseless claims of "attorney misconduct" are nothing more than a desperate attempt to obscure their own failure to timely appeal.

Equally important, while plaintiffs accuse defense counsel of "gamesmanship," it is plaintiffs who now make an argument that is directly contrary to the basis on which they opposed the defendants' Motion to Quash in the Superior Court. Specifically, beneath the redundant and accusatory nature of plaintiffs' Petition for Allowance of Appeal lies a single argument: the Schuylkill County Prothonotary never mailed Rule 236 notice of the December 30, 2005 Order and Opinion granting summary judgment. However, in responding to the law firm defendants' Motion to Quash in the Superior Court, plaintiffs specifically admitted that Rule 236 Notice was in fact sent. (See Exhibit "A," Answer to Motion to Quash, ¶10; admitting defendants' averment that the Order granting summary judgment "was docketed on December 30, 2005 and Rule 236 Notice was sent the same day."). The docket also clearly confirms that Rule 236 notice was sent. As a result, this Court should summarily reject plaintiffs' new Rule 236 argument and the baseless allegations of fraud devised by plaintiffs' new attorney.

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before this Court, is whether plaintiffs' appeal was timely. Plaintiffs' discussion of the "merits," which is false and misleading in any event, is totally irrelevant to the issue before this Court and should be disregarded.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF APPEAL

ALLOCATUR MUST BE DENIED BECAUSE PETITIONER HAS NOT SET FORTH SPECIAL AND IMPORTANT REASONS JUSTIFYING REVIEW BY THIS COURT, AS REQUIRED BY PA.R.A.P. 1114

The following sections of this Brief respond to plaintiffs' claims that the Schuykill County Prothonotary did not send proper notice of the December 30`h Order and that defense counsel made misrepresentations to the Superior Court. First, however, it is necessary to explain why the Superior Court had no choice but to quash plaintiffs' appeal.

I. The Superior Court Properly Quashed Plaintiffs' Appeal Because They Clearly Failed To Timely Appeal From The Entry Of Summary Judgment on December 30, 2005

"Upon review of an appeal, [an appellate court's] first task is to determine whether the matter is properly before [it]. . . .It is well-established that the failure to file a timely appeal will divest [an appellate court] of jurisdiction." Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1198 (Pa. Super. 1997)(citations omitted); see also, Sidkoff, Pincus, Greenberg & Green, P.C. v. Pennsylvania National Mutual Casualty Ins. Co., 555 A.2d 1284, 1287 (Pa. 1989), citing West Penn Power Co. v. Goddard, 333 A.2d 909 (1975)("The proposition that absent fraud or a breakdown in the courts the failure to timely appeal an order divests the appellate court of jurisdiction is irrefutable."). Here, plaintiffs' failure to timely appeal divested the Superior Court of jurisdiction and it was required to quash the appeal.

On May 5, 1993, plaintiffs commenced this civil

action by filing a writ of summons. In their subsequent Second Amended Complaint, which was filed on August 20, 1993, plaintiffs named as defendants the law firm defendants and Meridian Bank and its successors (hereinafter "the Meridian Bank defendants").[2] Plaintiffs and the Meridian Bank defendants ultimately settled all claims and counterclaims between them and, by Stipulation approved by the trial court and filed on March 31, 2003, they confirmed that all claims between them had been resolved and dismissed. The settlement between plaintiffs and the Meridian Bank defendants left the law firm defendants as the only defendants in the case.

On May 16, 2005, the law firm defendants filed a Motion for Summary Judgment with respect to all claims against them. By Order dated December 30, 2005, the trial court granted the Motion for Summary Judgment. (See Exhibits "C" and "D" to Petition for Allowance of Appeal, Order and Opinion of December 30, 2005). The Order was docketed on December 30, 2005, and the docket reflects that notice was sent the same day. (See Exhibit "F" to Petition for Allowance of Appeal, Docket Entries, p. 2 of 10; containing the notation "COPIES MAILED").

Pennsylvania Rule of Appellate Procedure 341(b) defines a final order as "any order that ... (1) disposes of all claims and of all parties[.]" Pa.R.A.P. 341(b)(1). Pursuant to Rule 341, an Order granting summary judgment disposing of all claims and all parties is clearly final and appealable. See e.g., Feidler v. Morris Coupling Co., 784 A.2d 812, 815 (Pa. Super. 2001)("Since the order granting summary judgment disposed of the entire matter, the order

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[2] While plaintiffs' precise theory of liability is not relevant, their Second Amended Complaint asserted claims of professional negligence and breach of fiduciary duty against the law firm defendants in connection with the attempt by plaintiff Canoe Manufacturing Company to borrow additional money from the Meridian Commercial Credit Corporation.

itself was final and appealable.")(emphasis added). Pennsylvania Rule of Appellate Procedure 903(a) provides that an appeal "shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a).

Thus, plaintiffs had 30 days, or until January 29, 2006, to file an appeal from the Order of December 30, 2005. Tohan, 696 A.2d at 1200 ("It is well-established that an order granting summary judgment is final and appealable. Therefore, to preserve the right to appeal once summary judgment is granted, an appeal must be filed within thirty (30) days after the entry of that order.")(citations omitted). Plaintiffs filed their appeal on February 7, 2006, thirty-nine (39) days after the trial court granted summary judgment and disposed of the remainder of the case. (See Exhibit "F" to Petition for Allowance of Appeal, Docket Entries, p. 1 of 10). Thus, plaintiffs appeal was clearly untimely and the Superior Court lacked appellate jurisdiction.[3]

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[3] It is irrelevant (and plaintiffs have not claimed otherwise) that, following the entry of summary judgment on December 30, 2005, a Praecipe for Entry of Judgment was filed on January 9, 2006. (See Exhibit "F" to Petition for Allowance of Appeal, Docket Entries, p. 2 of 10). Once again, the Order of December 30, 2005 had already granted summary judgment and "the order itself was final and appealable[.]" Feidler, 784 A.2d at 815 ("Since the order granting summary judgment disposed of the entire matter, the order itself was final and appealable."). Since the summary judgment was itself a final judgment, the subsequent Praecipe for Entry of Judgment "was a meaningless act" that did not toll the appeal time. See Progressive Home Fed. Say. & Loan v. Kocak, 518 A.2d 808, 809 (Pa. Super. 1986)("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered.").

In addressing a virtually identical issue nearly two years ago, the Superior Court stated the following:

> Since the order entered judgment on all claims and for all parties, it was immediately appealable and judgment did not need to be later entered by praecipe, although it was.... We advise the bar to be wary of a common pitfall[,]

Since plaintiffs failed to timely appeal the grant of summary judgment, there can be no doubt that the Superior Court lacked jurisdiction and the appeal was properly quashed. See Cresswell v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 181 (Pa. Super. 2003)("[I]t is clear Appellant's appeal from the grant of summary judgment in favor of Appellee PNMCI is untimely because it was filed more than 30 days after an immediately appealable final order. Therefore, this Court is divested of jurisdiction to entertain the appeal as to the grant of summary judgment in favor of Appellee PNMCI, and we must quash.")(citations omitted).

Consequently, the Superior Court had no choice but to quash plaintiffs' appeal.

II. Plaintiffs' Claim That The Schuylkill County Prothonotary Did Not Provide Rule 236 Notice Of The Order And Opinion Entering Summary Judgment Is Both Waived And Meritless

Beneath the fury and allegations in plaintiffs' Petition lies one central argument: they never received proper Rule 236 notice of the Order of December 30, 2005, which awarded summary judgment to the law firm defendants. (Petition for Allowance of Appeal, pp. 11-15). This argument must be summarily rejected.

As a preliminary matter, plaintiffs never raised this claim until they sought reargument in the Superior Court. In response to defendants' Motion to Quash, plaintiffs argued that they were

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> the appeal must be filed within thirty days of the Rule 236 notice of summary judgment, not a later-filed praecipe to enter judgment.

Gartland v. Rosenthal, 850 A.2d 671, 671 n.1 (Pa. Super. 2004)(emphasis added). Thus, the Order granting summary judgment, rather than the Praecipe for Entry of Judgment, triggered plaintiffs' appeal time.

not required to appeal the Order granting summary judgment because it did not dispose of all claims (which it clearly did) and because it did not specifically recite the entry of judgment (which it was not required to do). (See Plaintiffs' Answer to Defendants' Motion to Quash). Plaintiffs never claimed that Rule 236 notice was somehow inadequate. Indeed, in their verified Answer to the Motion to Quash, they specifically admitted receiving Rule 236 notice of the December 30`h Order. (See Answer, ¶10; admitting defendants' averment that the Order granting summary judgment "was docketed on December 30, 2005 and Rule 236 Notice was sent the same day.").

Of course, representations in motions and briefs are judicial admissions that are binding on the party who made them. See e.g., Bartholomew v. State Ethics Comm'n, 795 A.2d 1073, 1078 (Pa. Cmwlth. 2002)("A party's statements in its brief . . . are treated as a judicial admission... As McCormick indicates, judicial admissions are conclusive. A party may not offer evidence to contradict the judicially admitted facts.")(citation omitted). As a result, plaintiffs cannot now contradict their prior judicial admission that Rule 236 notice was in fact sent. Given this admission that they received Rule 236 notice, it is especially outrageous and offensive for plaintiffs to claim that defense counsel made a "glaring misrepresentation" when he stated in the Motion to Quash that plaintiffs' received such notice. (See Petition for Allowance of Appeal, p. 9).

Putting aside plaintiffs' tardy attempt to renounce their verified admission, the claim that the Prothonotary's Rule 236 notice was somehow deficient is clearly false. In fact, plaintiffs' argument is difficult to understand. According to plaintiffs:

> Date-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties, as the docket indicates. That fact is

> entirely irrelevant to the purely technical issues of timeliness on which the Motion to Quash purported to be based. What is significant is that no Rule 236 Notice accompanied that mailing and no docket entry even suggests that one did.

(See Petition for Allowance of Appeal, p. 9)(emphasis omitted).

As this passage indicates, plaintiffs admit that time-stamped copies of the December 30th Order and Opinion "were, indeed, mailed to the parties" on that date, as indicated by the docket. (Id). Nonetheless, plaintiffs argue that some "separate written notice" also should have been sent. (Id., p. 12). Stated otherwise, plaintiffs argue that, although they received written copies of the Order and Opinion, they did not receive written notice of the Order and Opinion. This argument is illogical because providing a written copy of an Order is providing written notice of the Order. It is simply ridiculous for plaintiffs to admit that they received an Order and then deny that they received notice of the Order.

Plaintiffs are simply wrong in arguing that Rule 236 requires "a separate written notice." The Rule states only that "[t]he Prothonotary shall immediately give written notice" and "[t]he notice shall include a copy of the order or judgment." Pa.R.C.P. 236(a)(2). The Note to the Rule emphasizes that it "does not prescribe a particular method of giving notice." Note, Pa.R.C.P. 236. Contrary to plaintiffs' suggestion, the Rule does not require some specific type of notice in addition to the Order; it simply requires "written notice" of the Order. Once again, providing a written copy of the Order is obviously providing written notice of the Order.[4]

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[4] The 1994 Explanatory Comment to Rule 236 explains that the prior version of the Rule required the Prothonotary to send written notice, but not an actual copy, of an Order. The 1994 amendment changed this practice and required the Prothonotary to send a copy of the Order. While plaintiffs suggest that the

There is no precedent for plaintiffs' claim that the Prothonotary must accompany the Order with a letter or some other notice stating that the Order has been entered. By receiving the written Order, a party has obtained written notice of the Order pursuant to Rule 236. The Rule 236 notice in this case was sufficient in all respects and plaintiffs' new argument to the contrary must be rejected.

Plaintiffs further argue that the docket does not reflect the entry of Rule 236 notice. (Petition for Allowance of Appeal, p. 14; "No Rule 236 Notice was sent nor was a notation made on the docket that Rule 236 Notice was sent. Neither was judgment entered on the docket on December 30, 2005."). This is clearly false. The Prothonotary sent the December 30`" Order and Opinion to the parties on that date and marked "COPIES MAILED" on the docket. (See Exhibit "F" to Petition for Allowance of Appeal, Docket Entries, p. 2 of 10). Contrary to plaintiffs' claim, the notation "COPIES MAILED" clearly indicates Rule 236 notice because it signifies that the Prothonotary mailed the Order and Opinion to the parties. There is no support for plaintiffs' repeated argument (in bold lettering) that a separate Rule 236 notice must actually accompany the mailing. Instead, Rule 236's requirement of written notice is satisfied by the very act of mailing an Order to the parties and no separate notice is required.

For all of these reasons, the Rule 236 notice provided by the Schuylkill County Prothonotary was proper in all respects.

III. Plaintiffs' Remaining Arguments

Prothonotary must now send both written notice and the Order, this is not true. Instead, it is only logical that a written copy of the Order is written notice of the Order. Accepting plaintiffs' argument would fundamentally change the manner in which Prothonotaries across Pennsylvania operate by requiring an additional, totally redundant notice that an Order has been entered.

Must Be Rejected

While plaintiffs' primary claim is that Rule 236 Notice was deficient, they make several other arguments as well. For instance, plaintiffs argue that Pa.R.C.P. 227.4(2) required the entry of a praecipe to enter judgment following the entry of summary judgment. (See Petition for Allowance of Appeal, pp. 14-15). Plaintiffs' reliance on Rule 227.4(2) is totally misplaced. Like the remainder of Rule 227, Rule 227.4(2) contemplates post-trial motions after a verdict and authorizes a party to enter judgment via praecipe. Indeed, the title of Rule 227.1 – Post-Trial Relief - removes any doubt that the Rule and its subsections refer to situations in which a trial has occurred. Here, of course, a summary judgment was entered prior to trial. Since a summary judgment is itself a judgment, as its name suggests, the filing of a separate praecipe to enter judgment would have been "a meaningless act." See Progressive Home Fed. Say. & Loan v. Kocak, 518 A.2d 808, 809 (Pa. Super. 1986)("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered. The subsequent praecipe for judgment was a meaningless act because the judgment had already been entered."). Plaintiffs' focus on a Rule authorizing the filing of a praecipe after trial is confused and mistaken.

Plaintiffs also rely heavily on this Court's decision in Frazier v. City of Philadelphia, 735 A.2d 113, 115 (Pa. 1999). (See Petition for Allowance of Appeal, pp. 11-14). This reliance is difficult to understand. Frazier merely held that an Order is not appealable until it is both entered on the docket and the docket reflects that notice of the Order has been sent. Id at 115 ("[A]n order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given."). Here, plaintiffs do not dispute that the December 30th Order and Opinion were docketed, and the docket undeniably

reflects that copies were mailed to the parties. As discussed above, the notation "COPIES MAILED" establishes Rule 236 notice and there is no support for plaintiffs' claim that the docket entry must actually refer to Rule 236. Instead, the Rule requires only that the docket indicates "the giving of the notice[.]" Pa.R.C.P. 236(b). Frazier does not assist plaintiffs' argument in any way.

Plaintiffs further rely on Hepler v. Urban ("Hepler I"), 544 A.2d 922 (Pa. 1988), and Hepler v. Urban ("Hepler II"), 609 A.2d 152 (Pa. 1992). (See Petition for Allowance of Appeal, p. 14). Neither case assists plaintiffs. In Hepler I, the docket contained no notation whatsoever that notice of the subject Order had been sent. Id. at 923 ("The docket does not indicate that a copy of the court order was mailed to appellant or to her attorneys."). In Hepler II, the record showed that "N.S." (supposedly meaning "Notice Sent") had been marked on the blueback attached to the trial court's copy of the subject Order, but, again, there was no notation in the docket reflecting notice. The Supreme Court held that "a notation on a blueback is not a notation in the docket that notice of entry of the order has been given." Hepler II, 609 A.2d at 154 (emphasis in original). Nothing in either of the Hepler opinions suggests that entering the notation "Opinion and Order of Court — Copies Mailed" in a docket, as the Prothonotary did in this case, is insufficient to show that notice of an Order was sent and received, especially where plaintiffs have acknowledged that "[d]ate-stamped copies of the lower court's decision and Order were, indeed, mailed to the parties." (Petition for Allowance of Appeal, p. 9).[5]

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[5] In addition to citing Frazier and the Hepler cases, plaintiffs cite a number of cases in which this Court reversed Orders of the Superior Court quashing appeals. (See Petition for Allowance of Appeal, pp. 10-11). However, none of those cases involved a situation in which the appellant failed to appeal within thirty days after summary judgment was granted as to all remaining

Plaintiffs also argue that the December 30th Order granting summary judgment was not itself a judgment and, therefore, plaintiffs were entitled to wait until a praecipe to enter judgment was filed before appealing. (See Petition for Allowance of Appeal, pp. 14-15). Plaintiffs simply refuse to recognize that, as its name suggests, a summary judgment is a judgment. See Progressive Home Fed. Say. & Loan, 518 A.2d at 809 ("Once the trial court's order entering [summary] judgment was filed on July 8, 1985, judgment was entered.") (emphasis added). Therefore, the December 30th Order did in fact enter judgment and plaintiffs were required to appeal within 30 days. See Tohan v. Owens-Coming Fiberglas Corp., 696 A.2d 1195, 1200 (Pa. Super. 1997).[6] It was totally unnecessary for a

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claims and all remaining parties.

Plaintiffs also claim that the law firm defendants misstated the outcome of the Supreme Court appeal in In re Trust Under Deed of Green, 779 A.2d 1152 (Pa. Super. 2001). LEXIS continues to indicate that the appeal from the Superior Court's decision in Green was in fact dismissed by the Supreme Court, as the law firm defendants had stated. More importantly, the law firm defendants merely cited Green for the proposition that an appellate court lacks jurisdiction to consider an untimely appeal. (See Defendants' Superior Court Motion to Quash, ¶16, citing Green, 779 A.2d at 1157, for the following: "Since the instant notice of appeal was filed beyond the thirty-day time limit within which to file an appeal[,] . . . we must conclude that we lack jurisdiction to consider the appeal."). This proposition is undeniable. See e.g., Sidkoff, Pincus, Greenberg & Green, P.C. v. Pennsylvania National Mutual Casualty Ins. Co., 555 A.2d 1284, 1287 (Pa. 1989), citing West Penn Power Co. v. Goddard, 333 A.2d 909 (1975)("The proposition that absent fraud or a breakdown in the courts the failure to timely appeal an order divests the appellate court of jurisdiction is irrefutable."). Therefore, regardless of what occurred in Green, plaintiffs' failure to timely appeal left the Superior Court with no choice but to quash their appeal. 6

[6] In addition to the fact that the December 30th Order granted summary judgment, it specifically recited that defendants were "entitled to judgment as a matter of law." (Order of December 30, 2005). This statement again belies plaintiffs' claim that the Order

separate judgment to be entered following the entry of summary judgment. Progressive Home Fed. Say. & Loan, 518 A.2d at 809.

CONCLUSION

Based on the foregoing, Defendants/Appellees, Joseph H. Jones, Esq., and Williamson, Friedberg & Jones, respectfully ask this Court to deny allowance of appeal.

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did not enter judgment for defendants.

CERTIFICATE OF SERVICE

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CANOE MANUFACTURING CO., INC., AND M. ROBERT ULLMAN,	:	NO. 415 MAL 2006
Petitioners	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
JOSEPH H. JONES, ESQUIRE AND WILLIAMSON, FRIEDBERG & JONES	:	
Respondents	:	

ORDER

PER CURIAM

AND NOW, this 1st day of November 2006, the Petition for Allowance of Appeal is denied.

FILED
FEB 16 2007

(2)

No. 06-1059

IN THE

Supreme Court of the United States

CANOE MANUFACTURING COMPANY, INC.
and M. ROBERT ULLMAN,

Petitioners,

v.

JOSEPH H. JONES, Esquire and
WILLIAMSON, FRIEDBERG & JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents object to the Petitioners' Question Presented on the ground that it assumes certain jurisdictional, procedural, legal, and factual premises that are demonstrably unfounded, as established more fully in the body of the present brief in opposition.

Respondents suggest instead the following Questions Presented:

1. Whether 28 U.S.C. § 1254 is an appropriate jurisdictional basis for Supreme Court review of a state court decision by writ of certiorari.

2. Whether a petition for a writ of certiorari requesting Fourteenth Amendment due process and equal protection review of a state court judgment should be denied where neither the Petitioners nor the state courts invoked or discussed the Fourteenth Amendment Due Process and Equal Protection Clauses in the state court proceedings.

3. Whether the Supreme Court may utilize GVR procedures by granting a petition for a writ of certiorari seeking Fourteenth Amendment due process and equal protection review of a state court decision, vacating the state court decision, and remanding to the state court for further consideration by the state court, where neither the Petitioners nor the state courts invoked or discussed the Fourteenth Amendment Due Process and Equal Protection Clauses in the state court proceedings.

4. Whether a federal question is presented under the Fourteenth Amendment Due Process and/or Equal Protection Clauses where Petitioners' failure to meet state court appellate filing deadlines was a result of their disregard of preexisting and controlling state court appellate precedent.

CORPORATE DISCLOSURE STATEMENT

Respondent Williamson, Friedberg & Jones is a law firm that has never had a parent corporation. No publicly held company has ever held any stock in Williamson, Friedberg & Jones.

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OTHER AUTHORITY

Shaun P. Martin, *Gaming the GVR*, 36 Ariz. St. L.J. 551 (Summer, 2004) 12

JURISDICTION

Petitioners assert that the Supreme Court is vested with jurisdiction pursuant to 28 U.S.C. § 1254. However, 28 U.S.C. § 1254 applies only to petitions for certiorari seeking review of decisions from United States Courts of Appeals. The correct basis for jurisdiction for a petition for a writ of certiorari seeking review of a state court decision would be 28 U.S.C. § 1257(a). However, as established below, Petitioners have not met the jurisdictional requirements of 28 U.S.C. § 1257(a) or, alternatively, have not complied with the Court's prudential requirements associated with 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioners seek review, by writ of certiorari, from a state court judgment. However, the petition fails to comply with Supreme Court Rule 14.1(g)(i), which requires Petitioners to include in their Statement of the Case a "specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts" as well as "pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction. . . ." As discussed more fully below, Petitioners cannot meet this requirement, because they never invoked the United States Constitution in the state court proceedings and no state court addressed federal constitutional issues.

On page 3 of the petition, Petitioners assert that their appeal to the Pennsylvania Superior Court was "summarily dismissed by the Deputy Prothonotary of the Superior Court. . . ." Similarly, on page 11, Petitioners state that "[o]n April 12, 2006, the Superior Court Deputy Prothonotary entered a Per Curiam Order quashing the appeal. App. 77a." Petitioners appear to suggest that it was the Deputy Prothonotary, as distinguished from the Superior Court judges, who quashed the appeal. However, the Order itself states: "The *court* hereby GRANTS the motion to quash." Pet. App. 77a (emphasis added). The Order is not signed by an individual judge or judges but is rather stated to be "PER CURIAM". *Id.* Significantly, the Deputy Prothonotary did not sign the Order but merely performed the administrative and ministerial act of filing it. Accordingly, no basis exists for Petitioners' suggestion that the Deputy Prothonotary ruled on the Motion to Quash.

The remainder of statements on page 3 ("Introduction") of Petitioners' Statement of the Case are rhetorical and conclusory in nature and, as demonstrated below, are refuted by the actual procedural facts of this case.

Pages 4-6 of Petitioners' Statement of the Case set forth Petitioners' version of factual and procedural events that occurred over a period of two decades. These matters are not relevant to any question that would be before the Supreme Court and, indeed, they have nothing to do with even the Petitioners' own formulation of the Question Presented. Rather, these issues were the subject of discovery and motion practice in the Pennsylvania state courts under Pennsylvania law long before the present procedural issue arose. Although it is accordingly not necessary to address these matters in the present brief, it should be observed that Respondents do

not agree with Petitioners' version of these factual, procedural, and Pennsylvania law matters. To take just one example, Petitioners suggest, on page 6, that the decision in the first state court appeal was the unanimous decision of a three-judge Superior Court panel consisting of Judges Klein, Bender, and Olszewski. However, contrary to Petitioners' representation, Judge Bender dissented from the majority's decision and opinion.

Petitioners' discussion of procedural facts relevant to their petition begins on page 7 of their Statement of the Case. The Court of Common Pleas of Schuylkill County, Pennsylvania (sometimes referred to hereinafter as "Court of Common Pleas") granted summary judgment in favor of Respondents on December 30, 2005. Pet. App. 10a, 12a-19a. The Court of Common Pleas docket contains two entries for December 30, 2005. One entry states: "ORDER-GRANTED". The other entry for December 30, 2005 states: "OPINION AND ORDER OF COURT-COPIES MAILED". Pet. App. 10a. (Note: Although page 10a of Petitioners' Appendix incorrectly states the filing date of the latter entry as "12/20/2005", the original docket stated "12/30/2005". This is not disputed, as Petitioners state on page 7 of their petition that the latter docket entry was dated December 30, 2005.)

A Schuylkill County Court of Common Pleas docket entry reflects that a "PRAECIPE FOR ENTRY OF JUDGMENT" was filed on January 9, 2006. Pet. App. 10a. The reproduction of the Court of Common Pleas docket on page 10a of Petitioners' Appendix is, however, incomplete, because the original docket shows that a fee of $9.00 was paid by Respondents in connection with the praecipe for entry of judgment. Indeed, an accurate reproduction of the docket

in this case would show that such a fee payment is unusual, thus reflecting the fact that a praecipe for entry of judgment involves an administrative procedure for closing the Schuylkill County Court of Common Pleas docket.

A second entry on the Schuylkill County Court of Common Pleas docket for January 9, 2006 states: "JUDGMENT ENTERED-NOTICES SENT". Pet. App. 10a.

It should be observed that neither the foregoing docket entries nor any of the papers associated therewith made any explicit reference to Pennsylvania Rule of Civil Procedure 236. Thus, Petitioners' statement on pages 7-8 of the petition that the January 9, 2006 notice was "a Notice sent pursuant to Pa. R. Civ. P. 236" is a legal argument by Petitioners and not a designation in the documents themselves. Indeed, the document that Petitioners contend was the Rule 236 notice states: "If you have any questions regarding this Notice, please contact the filing party," which it identified as Plaintiff M. Robert Ullman and his counsel in the trial court proceedings. Pet. App. 21a-22a. In other words, if Petitioners were to have any questions about the notice, they were to contact themselves. (Note: Undersigned counsel of record for Respondents, who was the attorney who filed the praecipe for entry of judgment, did not prepare the notice reproduced on pages 21a and 22a of Petitioners' Appendix and, in fact, never received a copy of it from the Schuylkill County Court of Common Pleas but rather saw it for the first time when it was later attached to one of Petitioners' filings.)

Having arrived at their legal conclusion that the January 9, 2006 notice (as distinguished from the December 30, 2005 notice discussed *supra*) was the Pa. R. Civ. P. 236 notice, Petitioners go on to say that "[o]n February 7, 2006, 29 days

after Rule 236 Notice was noted on the docket, Canoe and Ullman filed their Notice of Appeal. . . ." Pet. 8 (emphasis added). However, as established above, no explicit reference—either on the docket itself or in the associated papers—was made to Rule 236. The subject January 9, 2006 docket entry merely stated "JUDGMENT ENTERED-NOTICES SENT". Pet. App. 10a. Meanwhile, the December 30, 2005 docket entries had already stated: "ORDER-GRANTED" (referring to the grant of summary judgment) and "OPINION AND ORDER OF COURT-COPIES MAILED". Pet. App. 10a (note the date correction of the latter entry discussed *supra*).

Pages 9-10 of the petition contain an interesting, albeit irrelevant, discussion of Superior Court internal operating procedures. Petitioners then purport to characterize Respondents' Motion to Quash Petitioners' appeal to the Pennsylvania Superior Court. (Respondents' Motion to Quash is set forth on pages 39a-46a of Petitioners' Appendix and speaks for itself.) Petitioners take issue with the legal position set forth in the Motion to Quash that the Rule 236 notice was the December 30, 2005 notice. As established *supra*, neither the December 30, 2005 notice nor the January 9, 2006 notice contained any explicit reference to Pa. R. Civ. P. 236, and the question of which notice was the Rule 236 notice is a matter of Pennsylvania law.

Petitioners filed an Answer to the Motion to Quash in which they argued, inexplicably, that the December 30, 2005 Order was not a final order because it did not dispose of all claims and all parties. Pet. App. 47a-63a. Petitioners' argument was based on the fact that the Court granted summary judgment to Respondents on some but not all of the grounds set forth in the motion for summary judgment.

However, the result of the December 30, 2005 summary judgment was that *all claims* of *all Plaintiffs (the Petitioners)* were extinguished. No counterclaims existed in the case at this juncture. Nevertheless, Petitioners argued that the December 30, 2005 Order was not final, because the Schuylkill County Court of Common Pleas had not addressed some of the arguments in Respondents' motion for summary judgment. In making this and other arguments, Petitioners' Answer to the Motion to Quash never once cited any federal constitutional provision, statute, regulation, or decision.

Moreover, Petitioners' Answer to the Motion to Quash failed to make the argument, emphasized in the pending petition for a writ of certiorari, that the December 30, 2005 notice was not the Pa. R. Civ. P. 236 notice. To the contrary, Petitioners *admitted* that the December 30, 2005 notice *was* the Rule 236 notice. Numbered paragraph 10 of the Respondents' Motion to Quash alleged: "*The [summary judgment] Order was docketed on December 30, 2005 and Rule 236 Notice was sent the same day.* (See Exhibit 'A,' Docket Entries, p. 2; containing the notation 'COPIES MAILED')." Pet. App. 41a (emphasis added). In their Answer to the Motion to Quash, Petitioners responded: "*Admitted.*" Pet. App. 48a (emphasis added).

Respondents thereafter filed a Reply to Petitioners' Answer to the Motion to Quash. Pet. App. 64a-76a.

On April 12, 2006, the Pennsylvania Superior Court entered a per curiam Order granting the Motion to Quash. Pet. App. 77a. The Order stated simply and without opinion: "The *court* hereby GRANTS the motion to quash." *Id.* (emphasis added). It was signed "PER CURIAM". *Id.* There is no indication that the Superior Court Prothonotary or

Deputy Prothonotary ruled on the Motion to Quash, and the "per curiam" designation indicates that it was the decision of a panel of three judges as distinguished from a decision of a motions judge. Petitioners' statement that "the decision may well have been made by one judge relying on the reasoning of one Staff attorney" (petition 12) is unsupported in the record and is, in any event, irrelevant, since Petitioners do not argue that the decision of a single motions judge on this issue would violate the Constitution of the United States.

Petitioners thereafter filed what they styled an "Application for Reargument Before a Court *En Banc* of Order Improvidently Quashing Appeal" in the Pennsylvania Superior Court. Pet. App. 78a-94a. As indicated in the Table of Citations included with this Application, Petitioners failed to cite any federal constitutional provision, statute, regulation, or decision in their Application. *Id.* 81a. However, the Application now raised, for the first time, a Pennsylvania state law issue regarding Pa. R. Civ. P. 236 and made an argument (involving, *inter alia*, ad hominem attacks on Respondents' counsel) that directly contradicted their previous admission, discussed *supra*, that the December 30, 2005 notice was the Rule 236 notice. Pet. App. 83a-92a

In a per curiam Order filed May 5, 2006, the Pennsylvania Superior Court denied the Petitioners' Application for Reargument. Pet. App. 107a.

Petitioners then filed, in the Supreme Court of Pennsylvania, a Petition for Allowance of Appeal. Pet. App. 108a-129a. Again, as indicated in the Table of Citations of this document, Petitioners failed to cite any federal constitutional provision, statute, regulation, or decision. *Id.* 111a-112a. Respondents thereafter filed a Brief in Opposition

to Allowance of Appeal. Respondents' Brief in Opposition observed, *inter alia*, that Petitioners never raised the Pa. R. Civ. P. 236 argument until they sought reargument in the Pennsylvania Superior Court and that they specifically admitted, in their Answer to the Motion to Quash, that the Rule 236 notice was sent on December 30, 2005. Pet. App. 139.

On November 1, 2006, the Pennsylvania Supreme Court denied Petitioners' Petition for Allowance of Appeal. Pet. App. 148a. Thereafter, Petitioners filed the pending petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. SUPREME COURT JURISDICTION CANNOT BE PREDICATED UPON 28 U.S.C. § 1254 WHERE THE PETITIONERS SEEK REVIEW OF A STATE COURT JUDGMENT.

Petitioners invoke 28 U.S.C. § 1254 as the jurisdictional basis for their petition. However, 28 U.S.C. § 1254 applies, by its plain language, only to review, by writ of certiorari, of decisions of United States Courts of Appeals. Petitioners seek review of a decision of the Pennsylvania Superior Court, not a decision of a United States Court of Appeals. Accordingly, jurisdiction could only be predicated upon 28 U.S.C. § 1257(a). As explained *infra*, the petition does not meet the jurisdictional requirements of 28 U.S.C. § 1257(a) and/or the Court should deny the writ on the basis of prudential principles associated with 28 U.S.C. § 1257(a).

II. THE WRIT SHOULD BE DENIED, BECAUSE NEITHER THE PETITIONERS NOR THE STATE COURTS INVOKED OR DISCUSSED THE FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES IN THE STATE COURT PROCEEDINGS.

The Supreme Court has certiorari jurisdiction over state court judgments only pursuant to 28 U.S.C. § 1257(a), which provides in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Although Petitioners never argued in the state court proceedings a violation of the United States Constitution, their pending petition asserts, without substantial argument, that their rights have been violated under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

As established in the Statement of the Case, *supra*, Petitioners never cited, in the state court proceedings, any federal constitutional provision, statute, regulation, or decision with regard to any matter relevant to their petition. Although federal law was discussed in the trial court with reference to the bankruptcy issue raised in the second motion for summary judgment, the Petitioners raise no bankruptcy issue in their petition, nor could they raise any such issue given the procedural posture of this case. With regard to their current citation of the Fourteenth Amendment Due Process and Equal Protection Clauses, Petitioners had ample opportunities to invoke these federal constitutional provisions in their Answer to the Motion to Quash filed in the Pennsylvania Superior Court, in their Application for Reargument filed in the Pennsylvania Superior

Court, and in their Petition for Allowance of Appeal in the Pennsylvania Supreme Court. However, Petitioners never once cited those Clauses or any decisional authority discussing those Clauses.

The Court has recently summarized the jurisdictional or prudential principles applicable to the present petition as follows:

> Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added). Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam); *see also Illinois v. Gates*, 462 U.S. 213, 218 (1983) (tracing this principle back to *Crowell v. Randell*, 35 U.S. 368, 10 Pet. 368, 391 (1836), and *Owings v. Norwood's Lessee*, 9 U.S. 344, 5 Cranch 344 (1809)).
>
> Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases.

Howell v. Mississippi, 543 U.S. 440, 443 (2005) (per curiam) (emphasis added by *Howell*, footnote omitted).

The question of whether the foregoing "presentation requirement" is jurisdictional or prudential is unsettled, but, as in *Howell*, "even treating the rule as purely prudential, the circumstances here justify no exception." 543 U.S. at 445-46. In *Howell*, the Court dismissed the writ of certiorari as improvidently granted. *Id.* at 446. The Court should similarly deny the pending petition on the basis of the foregoing analysis and the related failure of the Petitioners to comply with Supreme Court Rule 14.1(g)(i).

III. THE COURT SHOULD NOT UTILIZE GVR PROCEDURES WHERE NEITHER THE PETITIONERS NOR THE STATE COURTS INVOKED OR DISCUSSED THE FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES IN THE STATE COURT PROCEEDINGS.

The petition requests the issuance of a "GVR" (granted, vacated, and remanded) order "to remedy the . . . violation of Petitioners' Due Process and Equal Protection rights . . . ." Petition i (Question Presented for Review). As demonstrated above, however, neither the Petitioners nor the state courts invoked or discussed either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in the state court proceedings. GVR practice may be broad, but it lacks a jurisdictional or prudential foundation when no relevant federal question was addressed in the state court proceedings of which Petitioners seek Supreme Court review.

This case is, to say the least, not the usual situation in which the Court invokes its GVR jurisprudence:

> [O]ver ninety-seven percent of the GVRs issued by the Court (thirty-seven out of thirty-eight remands) during 2003 were based upon intervening Supreme Court precedent, and over ninety-eight percent of GVRs during 2002 and 2001 (sixty-three out of sixty-four and eighty-three out of eighty-four cases, respectively) were similarly based upon intervening Supreme Court precedent.

Shaun P. Martin, *Gaming the GVR*, 36 Ariz. St. L.J. 551, 558 n.43 (Summer, 2004).

No intervening Supreme Court precedent is involved in this case, and, indeed, no intervening precedent of any kind has been cited by Petitioners.

The petition cites *Lawrence v. Chater*, 516 U.S. 163 (1996), in support of its request for GVR review. However, the per curiam opinion in *Lawrence* stated that "we believe that this Court has the power to remand to a *lower federal court* any case *raising a federal issue that is properly before us in our appellate capacity.*" *Id.* at 166 (emphasis added). In contrast, the present case is a request for review of a *state court decision* that is *not*, as demonstrated *supra*, properly before the Supreme Court in its appellate capacity. Moreover, *Lawrence* involved an intervening development, i.e., a new legal position that was taken by the Commissioner of Social Security (the respondent in that case). In fact, the Commissioner of Social Security, in his response to the petition for a writ of certiorari, "invites us to grant certiorari, vacate the judgment below, and remand the case (GVR) so

that the Court of Appeals may either decide it in light of the Commissioner's new statutory interpretation or remand the case to the Commissioner for reconsideration in light of that interpretation." *Id.* at 165. Under those circumstances, the Court agreed that a GVR order was appropriate. *Id.* at 165-66. However, no such procedural scenario exists with regard to the instant petition.

In *Lords Landing Village Condominium Council v. Continental Insurance Company*, 520 U.S. 893 (1997), the Court issued a GVR order in a diversity case where the Fourth Circuit Court of Appeals decided a Maryland state law issue without the benefit of a then recent decision of the highest state court in Maryland that cast doubt on the Fourth Circuit's state law holding. Again, the instant case involves no such procedural scenario.

The Court recently issued a GVR order with respect to a decision of the West Virginia Supreme Court of Appeals in a criminal case. *Youngblood v. West Virginia*, __ U.S. __, 126 S. Ct. 2188 (2006). However, in *Youngblood*, the defendant "clearly presented a federal constitutional *Brady* claim to the State Supreme Court . . . as he had to the trial court. . . ." 126 S. Ct. at 2190. In the present case, Petitioners failed to present their Fourteenth Amendment due process and equal protection arguments to any state court.

Therefore, the Court should decline to issue a GVR order in the instant case. The Court lacks subject matter jurisdiction to grant a GVR order and/or should invoke its prudential jurisprudence to deny a GVR order where Petitioners failed, in the state court proceedings, to invoke the federal constitutional provisions upon which they now rely.

IV. NO FEDERAL QUESTION IS PRESENTED UNDER THE FOURTEENTH AMENDMENT DUE PROCESS AND/OR EQUAL PROTECTION CLAUSES WHERE PETITIONERS' FAILURE TO MEET STATE COURT APPELLATE DEADLINES WAS A RESULT OF THEIR DISREGARD OF PREEXISTING AND CONTROLLING STATE COURT APPELLATE PRECEDENT.

As established *supra*, the petition should be denied, because neither Petitioners nor the state courts invoked or discussed the Fourteenth Amendment Due Process or Equal Protection Clauses in the state court proceedings. In addition or in the alternative, the petition presents no substantial federal question under the Fourteenth Amendment Due Process and Equal Protection Clauses. In fact, the petition nowhere cites any decisional authority, or even elaborates any argument, to support any theory of violation of either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Although the petition, for the first time in the history of this case, now mentions the Fourteenth Amendment Due Process and Equal Protection Clauses, it fails to make any federal constitutional argument and cites no decisional authority supporting any federal constitutional theory.

Petitioners' analysis in this Court, like their analysis in the state courts below, relies solely on argumentation regarding state law issues. Although it hardly seems necessary to respond in this Court to Petitioners' state law arguments, the present brief addresses them in order to correct certain misimpressions the Petitioners advance regarding the procedural history of this case and the applicable state law.

Rule 236 of the Pennsylvania Rules of Civil Procedure provides in pertinent part:

> (a) The prothonotary shall immediately give written notice of the entry of . . .
>
> (2) any other order or judgment to each party's attorney of record or, if unrepresented, to each party. The notice shall include a copy of the order or judgment.
>
> . . . .
>
> (b) The prothonotary shall note in the docket the giving of the notice. . . .

The Schuylkill County Court of Common Pleas granted summary judgment in favor of Respondents on December 30, 2005. Pet. App. 10a, 12a-19a. That Court's docket contains two entries for December 30, 2005. One entry states: "ORDER-GRANTED". The other entry for December 30, 2005 states: "OPINION AND ORDER OF COURT-COPIES MAILED". Pet. App. 10a. (Note: Although page 10a of Petitioners' Appendix incorrectly states the filing date of the latter entry as "12/20/2005", the original docket stated "12/30/2005". This is not disputed, as Petitioners state on page 7 of their petition that the latter docket entry was dated December 30, 2005.)

The December 30, 2005 entries make it clear that the Pa. R. Civ. P. 236 requirements were met in the docket entries for that date. Although those docket entries did not explicitly mention Rule 236, neither did the January 9, 2006 docket entries on which Petitioners now rely. (See the Statement of the Case, *supra*.) Rule 236 does *not* require any explicit

reference to that rule in the docket entry. Accordingly, it is not surprising that Petitioners *admitted*, in their Answer to the Respondents' Motion to Quash the appeal to the Pennsylvania Superior Court, that *the Pa. R. Civ. P. 236 notice was, in fact, the December 30, 2005 notice*. Numbered paragraph 10 of the Respondents' Motion to Quash alleged: "*The [summary judgment] Order was docketed on December 30, 2005 and Rule 236 Notice was sent the same day.* (See Exhibit 'A,' Docket Entries, p. 2; containing the notation 'COPIES MAILED')." Pet. App. 41a (emphasis added). In their Answer to the Motion to Quash, Petitioners responded: "*Admitted.*" Pet. App. 48a (emphasis added). Petitioners did not make their current Rule 236 argument until *after* the Superior Court quashed the appeal in reliance upon their admission. Having waived this argument in their Answer to the Motion to Quash, Petitioners cannot legitimately claim that they were denied their rights under the Fourteenth Amendment Due Process and Equal Protection Clauses.

Petitioners rely on *Frazier v. City of Philadelphia*, 557 Pa. 618, 735 A.2d 113 (1999), but that decision does not support their position. In *Frazier*, a final order

> was entered on the docket on April 8, 1997, and notice of the order was mailed to and received by the parties. The prothonotary, however, failed to indicate on the docket, as required by Rule 236 of the Pennsylvania Rules of Civil Procedure, that notice of the order had been provided to the parties.

557 Pa. at 619-20, 735 A.2d at 114. In contrast, as demonstrated *supra*, the Prothonotary of Schuylkill County, in the present case, entered the following two items on the

docket for December 30, 2005: "ORDER-GRANTED" and "OPINION AND ORDER OF COURT-COPIES MAILED". It is undisputed that these docket entries refer to the grant of the summary judgment to Respondents on December 30, 2005. As Petitioners admitted in their Answer to the Motion to Quash, the December 30, 2005 "COPIES MAILED" docket notation properly reflected that Rule 236 notice was sent the same day.

Moreover, the procedural scenario in *Frazier* was different from that of the present case. In *Frazier*, the subject of the Rule 236 notice was a default judgment. The present case involves a summary judgment. The Pennsylvania Superior Court (the intermediate Pennsylvania appellate court for nongovernmental matters) issued a caveat to all Pennsylvania attorneys in a famous April 23, 2004 published decision: "*We advise the bar to be wary of a common pitfall[:] the appeal must be filed within thirty days of the Rule 236 notice of summary judgment, not a later-filed praecipe to enter judgment. Gartland v. Rosenthal*, 2004 Pa. Super. 134, 850 A.2d 671, 671 n.1 (2004). This has long been the rule in Pennsylvania:

> The subsequent praecipe for judgment was a meaningless act because the [summary] judgment had already been entered. . . . Because the appeal from the summary judgment was filed on August 15, 1985, more than 30 days after the entry of the judgment on July 8, 1985, the present appeal is untimely and must be quashed.

Progressive Home Fed. Sav. & Loan Ass'n v. Kocak, 359 Pa. Super. 120, 123, 518 A.2d 808, 809 (1986); *accord Feidler v. Morris Coupling Co.*, 2001 Pa. Super. 294, 784 A.2d 812,

814 n.1 (2001) ("In an abundance of caution, Morris Coupling sought entry of judgment on the order granting its motion for summary judgment. Since the order granting summary judgment disposed of the entire matter, the order itself was final and appealable.").

Petitioners' reliance on *Hepler v. Urban*, 518 Pa. 482, 544 A.2d 922 (1988) ("*Hepler I*"), and *Hepler v. Urban*, 530 Pa. 375, 609 A.2d 152 (1992) ("*Hepler II*"), is misplaced. *Hepler I* reversed a summary judgment where there was "no notation in the docket that notice was given concerning entry of the order granting appellees' motion for summary judgment." 518 Pa. at 485, 544 A.2d at 923. In contrast, as established *supra*, a notation on the docket in the present case stated that copies of the Order granting summary judgment were mailed on December 30, 2005. *Hepler II* merely held that a notation on a blueback attached to a summary judgment order was not a notation in the docket that notice of the summary judgment had been given. 530 Pa. at 380, 609 A.2d at 152. Since a December 30, 2005 notation in the docket in the present case states that copies of the summary judgment order were mailed on that date, *Hepler II* is also inapposite.

Thus, Petitioners' entire argument regarding *stare decisis* is irrelevant. The quashal of the Petitioners' appeal in the present case was entirely consistent with Pennsylvania precedent. Moreover, the United States Supreme Court *stare decisis* decisions cited in the petition involve only *stare decisis* issues at the level of the Supreme Court. None of the decisions cited in the petition stands for the proposition that the Supreme Court will find a violation of the Fourteenth Amendment for an alleged defect in state court *stare decisis* analysis. Indeed, the approach suggested by Petitioners would

be inconsistent with the principles of federalism that are essential to our form of government. Insofar as the petition cites Pennsylvania law on *stare decisis*, that is a matter for the Pennsylvania state courts, not for the Supreme Court of the United States.

Petitioners would have the Court issue a GVR order on the basis of Pennsylvania law. However, as established above, even the requirements of Pennsylvania law were met in this case. Petitioners' failure to comply with pre-existing and controlling Pennsylvania law precedent was the sole cause of their untimely filing of an appeal to the Pennsylvania Superior Court. Moreover, the petition invokes the Fourteenth Amendment Due Process and Equal Protection Clauses but does not discuss Fourteenth Amendment due process and equal protection principles. The petition fails to cite any Supreme Court or other authority holding that the type of procedural scenario involved in this case violates the Fourteenth Amendment. Accordingly, the petition fails to raise a substantial federal question, and the writ should be denied for this additional reason.

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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